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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-93

WALTER J. HOWARD, LEANDRUS JORDEN, ARTHUR L. DAVIS, WILLIE E. JORDAN, GORDON ROGERS, MOSES MEEKS, JAMES L. SIMS AND H. A. CRUMP, INDIVIDUALLY AND AS MEMBERS OF A CLASS,

Petitioners

v.

FLORIDA EAST COAST RAILWAY CO., INC. AND NEHEMIAH MUNGIN, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Opinion Below

The Court of Appeals delivered no opinion. The District Court delivered no opinion in connection with the judgment appealed from which was an approval of a class action settlement (Appendix B to this Petition, infra). However, the District Court did render an opinion in overruling a "Motion for Relief from Judgment" which was filed by these Petitioners under Rule 60(b) of the Federal Rules of Civil Procedure. The latter is reported at 318 F.Supp. 720 (1970) and is set out as Appendix A to this Petition.

An opinion of the Court of Appeals in a prior appeal of this case is reported at 416 F.2d 1169 (1969) and is set out infra as Appendix C to this Petition.

Jurisdiction

The decree of the Court of Appeals was entered on April 19, 1971 (Appendix D, infra). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Question Presented

Whether a disputed class action compromise should have been approved by the District Court, and later reaffirmed by it, under Rule 23(e) of the Federal Rules of Civil Procedure where:

(1) Representative status was placed upon the individual plaintiffs without their prior knowledge and over the objections of some of them; and

(2) The District Court gave preliminary approval to a class action settlement which was previously

unknown to the individual plaintiffs, as well as to the members of the class, which preliminary approval was communicated to the affected members of the class under the imprimatur of the court; and

(3) Formal notices to the members of the class did not include all of the relevant information, much of which was lodged in the office of the District Clerk to which members of the class were referred for further information; and

(4) Where intervention by a party of arguably hostile disposition was presented by attorneys for the individual plaintiffs and the members of the class without their prior knowledge; and

(5) Individual plaintiffs were given no opportunity to question or challenge the amount of their recovery without challenging the recovery by other members of the class; and

(6) In light of all the other attendant procedures and circumstances by which the compromise was developed and approved.

Civil Procedure Rule Involved

Relevant provisions of Federal Rule of Civil Procedure 23, as amended, provide as follows:

"(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Statement

A. *History Antecedent to Filing of Complaint*

In 1963, the Florida East Coast Railway Company, Inc., here called FEC, abrogated the collective bargaining agreements between itself and labor organizations representing its employees. In response to a strike against it by eleven unions, the railroad unilaterally issued what it called a "Uniform Working Agreement" which set forth uniform rates of pay, rules and working conditions in the place of, and substantially different from, its previous collective bargaining agreements. This action by FEC became the subject of much litigation, including review by this Court. A common thread in all of the judicial opinions[1] was that the FEC's unilateral action was in "flagrant violation of the Railway Labor Act".[2]

B. *Initial District Court Proceedings*

The complaint in the instant case was filed in the United States District Court for the Middle District of Florida, Jacksonville Division, on November 29, 1967, by 75 of FEC's Negro locomotive firemen. The complaint alleged in greater detail the above described history and

1. These opinions, in the principal cases, are the following: *Florida East Coast Ry. v. Bhd. of R.R. Trainmen*, 336 F.2d 172 (5th Cir. 1964), cert. den. 379 U.S. 990 (1965); *Florida East Coast Ry. v. United States*, 348 F.2d 682 (5th Cir. 1965); *Bhd. of Ry. and S.S. Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966) (affirming 348 F.2d 682); *Florida East Coast Ry. v. Bhd. of Locomotive Engineers*, 362 F.2d 482 (5th Cir. 1966); *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); and *Bhd. of R.R. Trainmen v. Atlantic C.L.R.R.*, 362 F.2d 649 (5th Cir. 1966), aff'd 385 U.S. 20 (1966) (equally divided court).

2. *Mungin v. Florida East Coast Ry.*, 416 F.2d 1169, 1175 (5th Cir. 1969).

litigation, and it asked for a reconstruction of the *status quo*, including lost pay to each of the 75 firemen because one of the illegal, unilateral acts was the elimination of their jobs. On motion by FEC, the District Court dismissed the complaint for lack of subject matter jurisdiction. An appeal immediately followed, and the result was an extremely well written opinion which summarized the entire dispute between the railroad and the unions and which reversed the dismissal of the case. (See Appendix C, infra.)

Following remand of the case, attorneys for FEC and the individual plaintiffs initiated class action compromise discussions. The details were worked out within a period of 16 or 17 days preceding December 30, 1969 without notice of the pendency of this compromise to the original 75 plaintiffs except for informal notice to two of them by their attorneys, Messrs. Milledge and Horn. The entire proposal to convert to a class action and to compromise was presented to the District Court on December 30, 1969.

Part of the compromise required that the suit be transformed from an individual action by 75 firemen into a class suit on behalf of all railroad firemen who held seniority on a certain date. These turned out to be a total of about 200 men, 125 of whom received or will receive something from the settlement. Accordingly, on December 30, 1969, a motion for leave to convert to a class action under Rule 23(b)(1) and (b)(2) was presented and granted the same day by the District Court.

Another part of the compromise required the abolition of the classification of firemen. Accordingly, on the same day the firemen's union, IARE, plaintiffs' collective bar-

gaining representative, was allowed by the District Court to intervene as an additional plaintiff represented by the same attorneys who were then representing plaintiffs. At the same time, a quickly designed collective bargaining agreement between IARE and FEC was filed among the papers in the case. The agreement abolished the craft of locomotive firemen and provided substitute job opportunities. (In this connection, it must be noted that the decision of the Fifth Circuit had allowed the 75 firemen to sue the FEC directly rather than require a suit by their collective bargaining representative because the union had allegedly "failed in its duty of faithful representation" by reason of "disloyalty, corruption, or other influences." 416 F.2d at p. 1178.)

Another feature of the compromise was the payment of $800,000 damages to the class of firemen. (Eventually one-third of this settlement fund was allocated by the District Court to plaintiffs' attorneys.)

On the same day, the District Court entered this order: ". . . the Court approves preliminarily as fair, adequate and proper in the circumstances the Application and the Stipulation of Settlement, including specifically the Trust Agreement creating the 'FEC Firemen's Trust Fund', with Allan Milledge and Richard L. Horn as Trustees bonded as provided therein and the collective bargaining agreement between IARE and FEC." (The Trust Agreement provided for the immediate payment by FEC of the $800,000 to Petitioners' attorneys as Trustees and the disbursement by the Trustees of the money in three installments, $300,000 on April 1, 1970, $300,000 on April 1, 1971, and the remaining balance on April 1, 1972. The staggered disbursement of the trust funds also

applied to the disbursement of the one-third attorney's fee.)

The preliminarily approved stipulation of settlement also provided a formula for the distribution of the money to the approximately 125 men.

On the same day, the District Court approved a notice to be sent to the members of the class at least 20 days before final approval of the settlement. The approved notice told the men that "A hearing has been held on the preliminary advisability of said settlement, and the Court having heard from representatives of all the parties has preliminarily approved the settlement as fair, adequate and proper in the circumstances."

The approved notice also provided for each individual to be told the amount due to him under the terms of the settlement and of the trust fund. It also specified that "A hearing on the final advisability of the settlement of this action would be held before the Honorable Charles R. Scott, at the United States Courthouse at Jacksonville, Florida, on the 3rd day of March, 1970, at 10 A.M. o'clock, at which time all interested parties may be heard." The notice went out with the Court's official style at the top and the attorney's signature at the bottom.

The approved notice also advised the members of the class that certain documents were on file in the Clerk's office "and may be examined by you there." These documents were the original complaint, plus a motion to amend that complaint, plus a motion for intervention, plus a motion to allow maintenance as a class action, plus orders granting said motions, plus a full copy of the stipulation of settlement, including a copy of the trust instrument

and a copy of the agreement between FEC and IARE concerning abolition of the craft of Locomotive Firemen and eligibility for promotion of employees holding seniority as Locomotive Firemen as of the effective date of the agreement to operating positions with FEC. (Thus, members of the class were referred to the Clerk's Office at Jacksonville where they could learn of the intervention by IARE, the representation in the intervention by their own attorneys, the formula for the division of the $800,000 and the details of the abolition of their craft and the provision of substitute seniority privileges to obtain other work with FEC.)

The Stipulation of Settlement was all important because its formula determined who received what. Even though it was preliminarily approved by the Court on December 30, 1969, it was later changed pursuant to a Trustee's motion to amend the formula "so as to accomplish a more equitable distribution of the funds to the various members of the class." The amendment substituted earnings in the year 1962 for the average earnings of the years 1960, 1961, and 1962 to arrive at a "base pay factor." It was approved January 21, 1970. All this was done without formal notice to the men other than to refer them to the documents on file in the Clerk's office.

The first actual notice of either the details of the compromise, or even the prospect of compromise, was received by most of the locomotive firemen through the newspaper accounts of the December 30 court proceedings. Later, on February 5 and 6, the court-approved notice was sent to each member of the class of locomotive firemen, and the matter finally came on for final hearing before the District Court on March 11, 1970. The no-

tice included a "Trustee's statement" of the amount each man would receive. See Appendix E, infra.

C. *Proceedings to Approve the Compromise*

Although six of the present Petitioners,[3] and many other firemen, were present at this hearing, only three persons offered testimony in an attempt to override the proposed settlement. One of these three individuals[4] stated that there were other firemen, present in the courtroom, who were opposed to the settlement, but the record is silent as to the reasons underlying the failure of these other individuals to place their opposition on record. The Court's final order approving the compromise, and its judgment, were then entered on the same day at the conclusion of the hearing.

These Petitioners then scurried to find other counsel through whom they filed a timely notice of appeal to the Court of Appeals from the Court's judgment of March 11, 1970.

D. *District Court Proceedings Pending Appeal*

On June 1, 1970, these Petitioners, now joined by an additional 14 men, filed their "Motion for Relief from Judgment" in the District Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On the same day, they also filed in the Court of Appeals their "Motion to

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3. These petitioners were Henry A. Crump, Arthur L. Davis, Walter J. Howard, Leandrus A. Jorden, Moses Meeks, and Gordon Rogers.

4. Mr. Jorden attempted to enlighten the District Court on this point in the following manner:

> "Is the court under the impression that these are the only two people that is against this settlement? If so, I'm afraid it's not so. There is a number of us."

Stay the Appeal" pending disposition of the motion in the District Court. The motion to stay asked that further proceedings in the appeal be stayed "until the District Court has been afforded an opportunity to rule upon Appellants' Motion for Relief from Judgment, and if such ruling be adverse, until Appellants have had the opportunity to include such ruling in the record as additional grounds for appeal." The motion was granted on June 11, 1970.

On June 29, 1971, the District Court heard oral argument on the Motion for Relief from Judgment but refused to permit the taking of formal testimony or evidence on the allegations made in the motion. On August 11, 1970, the District Court entered its formal findings of fact and conclusions of law on the motion and denied it. These are reported at 318 F.Supp. 720 and are set out infra at Appendix A.

E. *Proceedings in the Court of Appeals*

Following the District Court's orders above set out, the Court of Appeals heard oral argument and proceeded to enter its per curiam affirmance under its Local Rule 21. In the Court of Appeals, attorneys for the FEC and the non-appealing firemen attempted to obtain dismissal of the appeal from the District Court's order of August 11, 1970, on the ground that Petitioners had failed to take an appeal from that particular order. However, the Court of Appeals apparently overruled the argument and affirmed the case judging from a nearly identical unreported case entitled *Kilian v. Self,* No. 28534 (C.A. 5, 1970). In any case the appeal from the original judgment adequately presents the issues of the case.

F. *The Challenge to the Settlement*

Although they have not been heard on the matter, Petitioners desire to challenge the settlement in several respects and the procedures by which it was approved. We say that the division of the funds was not equitable and should be reviewed. We say that the proceedings below and their results were tainted by a conflict of interest on the part of counsel. We say that it was error to fail to give at least some notice to the original 75 plaintiffs of the proposed transformation of the case from an individual to a class action and its settlement as such. We say that the notices to the members of the class were inadequate to satisfy the vital notice purposes of Rule 23(e) of the Federal Rules of Civil Procedure. Most of all we say that the announced preliminary approval by the Court of the settlement as fair, adequate and proper in the circumstances, coupled with the lack of full information to the members of the class in the formal Rule 23(e) notice, coupled with the manner in which the hearing was held on March 11, 1970, effectively chilled the adequate preparation by the dissenters and the presentation of the dissenting views of these Petitioners and others thereby depriving the District Court of the full and complete information which would have enabled it properly to evaluate the proposed settlement and its various details.

In this connection, when one of the Petitioners challenged the amount of his own proceeds, he was told that he must oppose the entire settlement for everyone and not merely his own proposed recovery. At another point in the proceedings, one of the testifying Petitioners was asked by the Court if he had a license to practice law. The effect upon a group of workingmen like these can well be imagined. Also, the Court overlooked the possible

impairment of their legal representation by the simultaneous representation of IARE by their attorneys and the attorneys' enormous stake in the settlement proposal.

G. *The Holdings of the Courts Below*

Regrettably, the panel of the Fifth Circuit which heard this case saw no problem which deserved discussion, and it affirmed without opinion under its Local Rule 21.

The opinion of the District Court is full and explicit. It fully answers the Petitioners' complaints below and here by a series of rulings which Petitioners say are foreign, indeed disastrous, to proper settlement procedures, approaches and attitudes under Rule 23(e).

The District Court answered Petitioners' points one by one, in part, by these holdings:

1. The allowance of the class action was absolutely necessary because of the nature of the case, and most properly, the allowance was made under Rule 23(b)(1) or (b)(2). Therefore, no member of the class had a right to withdraw from the class. Also prior notice of the proposed conversion of the case to a class action was not necessary.

2. The collective bargaining agent, IARE, dealt honorably and properly.

3. To date 90% of the represented employees have not objected.

4. An attorney, like the attorneys who handled the settlement, has "exclusive management and control of the action."

5. Petitioners were not illiterate or juveniles and could have sought other counsel before March 11, 1970, the

date of the hearing for approval. The Court had no duty to suggest to the members of the class the right to confer with other counsel.

6. The Court's notice told all members of the class where the relevant documents were to be found (in the Clerk's Office) and that they could be examined.

7. The members of the class had notice that the first payout of money would occur on April 1, 1970, following the approval of the settlement on March 11, 1970. Therefore, estoppel results from the acceptance of the April 1 installment of money by those who did accept (although two did not).

8. Petitioners made no restoration of the money and thus did not restore the *status quo*.

9. Petitioners ratified the approval of the settlement by acceptance of the money.

10. It is a client's duty to express his disapproval of a settlement entered by his attorney within a reasonable time. Otherwise a ratification results.

11. One of the Petitioners failed to speak up in Court.

12. The formal notice of the Court's preliminary approval of the compromise was not a defect since it was subject to final approval later.

Thus, the Court did not go into Petitioners' claims of inequity as to their respective recoveries.

Reasons for Granting the Writ

1. This is a major, important episode in class action settlements under Rule 23. There is little or no law to guide the lower courts concerning the standards of inves-

tigation which a District Court should adopt when encountering dissent supported by arguably suspicious circumstances. It was held thirty years ago by this Court in a municipal bankruptcy case that a federal court should not put its imprimatur upon a composition of debts where it has not delved into the facts sufficiently to assure itself that the settlement is free of conflict of interest and inequity, and is supported by sufficient disclosure and distribution of information to affected parties. *American United Mutual Life Ins. Co. v. City of Avon Park, Fla.*, 311 U.S. 138 (1940). Petitioners suggest that we are now crossing the same bridges under Rule 23. The District Court had no appellate guidance which would suggest to it an affirmative duty on its part to inquire into the various phases of the settlement. Accordingly, it applied doctrines of law which have little or no relevance to a class action settlement. In sum, the District Court placed a heavy burden upon the members of the class to impeach the proposed settlement before they could reasonably understand, or be expected to understand, the ramifications of their problem and at the same time recognized no duty of its own to help them affirmatively.

2. The panel of the Court of Appeals recognized no problem important to the jurisprudence of Rule 23. The District Court was able to refer to no authority which illuminates the standards which it should apply.

3. Without intending disrespect to the actors below, undersigned counsel is compelled to state that the procedures of settlement were near scandalous.

First, the settlement was negotiated before the class action was filed. Neither the proposed class action nor the settlement was made known to the 75 plaintiffs. There

was thus no possible intelligent decision by litigants (as distinguished from lawyers) as to what should be done and how matters should be handled. We suggest that the views of the actual parties to the litigation are not entirely irrelevant although, admittedly, the views of attorneys are certainly most important.

Second, the preliminary approval of the compromise and the related transactions by the Court, duly advertised by the Court to the individuals, had the natural consequence of causing Petitioners and the others to believe that the federal judge had made an informed evaluation in favor of approval of the plan. The actual order of the Court on December 30 preliminarily approved the plan as fair, adequate and proper. The Court also approved the collective bargaining agreement between FEC and IARE although one wonders at the propriety of this brief excursion by a Court into the collective bargaining field. The Court's official notice, after telling the members of the class that the Court had preliminarily approved the plan of settlement, announced a hearing "at which . . . all interested parties may be heard." A much more appropriate statement would have invited all parties to freely state their objections and would not have given them to understand that the federal judge had already preliminarily decided that everything was right and proper because he, the Judge, had "heard from representatives of all the parties." Also, the actual notice which was sent out contained the style of the case at the top under the usual title:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

and then continued with miscellaneous statements from the Court and from the "Trustees" and finally ended up with the signature of plaintiffs' counsel. Also, the notice told the members of the class that certain documents were on file in the District Court and "may be examined by you there." The documents referred to a motion for intervention (I.A.R.E. without mentioning the intervenor's name). The notice also referred to a copy of the collective bargaining agreement between the railroad and the union concerning abolition of the craft of locomotive firemen and eligibility of such employees to claim other jobs. For some reason, the Court's order of December 30 "approved" the collective bargaining contract but the notice to the men did not say so. Indeed, the notice to the men does not say that the collective bargaining agreement was, or was not, a material consideration for the cash settlement of $800,000. See Appendix E, infra.

4. The unseemly haste with which the compromise was worked out and presented to the court for preliminary approval effectively precluded any opportunity for consideration of individual variations or equities concerning each fireman's respective share in the settlement moneys. In the absence of prior notice or discussion among the class members, that presentment resulted in preliminary court approval of a formula theoretical in nature for determining each fireman's share in substance where it was never given the acid test of detailed individual criticism. Even though several firemen protested his portion of the settlement at the final hearing of March 11, each was immediately answered with the retort that insistence on individual consideration "might result in blocking the settlement for the others involved". In light of what transpired at the final hearing, therefore, the advance approval

tended to discourage any testing of the distribution formula.

5. The preliminary court approval was the major but not the sole cause of the untenable position in which petitioners found themselves at the final hearing. Also, causally related was what they later found and alleged to be both a conflict of interest on the firemen's attorneys, and, also, an abandonment of attorney-client relationship. The latter was occasioned by transformation of the suit into a class action. For this change meant that the attorneys initially selected by the 75 individual firemen were now unalterably in favor of the compromise they, themselves, had created and incapable of providing the necessary undivided loyalty essential to their prior attorney-client relationship with the dissidents. In thus attempting to relate to the court the reasons why the settlement, as proposed, was unfair, the individual petitioners were made to appear before the court and argue their own case without the very counsel whom they had initially retained. The District Court, itself, took notice of their ineptness in doing so by interrupting Petitioner Crump in the middle of his attempt to demonstrate the reason why his portion of the settlement was insufficient, with the question, "You don't have a license to practice law do you?".

Another factor which impinged on the ability of petitioners to forcefully present their argument at the final hearing was the fact that the class action, itself, had been suggested during the settlement negotiations among the attorneys as the method by which the FEC could eliminate future damage actions by other firemen not yet in court and simultaneously dispose of the entire claim by making a settlement binding on all firemen under Rule of Civil

Procedure 23(b), including any and all dissident elements in the new class.

6. A District Court has held a primary purpose of notice under Rule 23(e) is to encourage class members to respond to a settlement proposal by appearing before the Court with evidence relevant to the propriety and fairness of the compromise. *Birnbaum v. Birrell,* 17 F.R.D. 409, 412 (S.D.N.Y. 1955). Our position is that the District Court's stamp of approval to a previously unknown compromise proposal can have no other effect but to chill both the quantity and quality of desired response from members of the class. While not final, the preliminary approval can only convey the impression of a less than welcome reception to the presentation of dissent, especially that which might show the compromise to be unfair as applied to specific individuals in the class.

7. A second way to analyze the problem is in terms of burden of proof. It should be an unquestioned proposition that "the burden is on the proponents of the compromise to show that the settlement is fair and reasonable." 3B Moore's Federal Practice Sec. 23.80[4] at p. 23-1555; see also *Birnbaum v. Birrell,* supra n. 15 at 412, and *Norman v. McKee,* 290 F.Supp. 29 (D.C. Calif. 1968). The tentative approval by the Court accompanied by incomplete distribution of information does in a practical way shift a heavy burden to the dissenters. In this connection we note that the formula for distribution of the money was not mailed to the members of the class. It was on file in the District Clerk's Office. Therefore, the results of the formula were not even known to the District Court nor to the parties at the time the Court's tentative approval was given on December 30, 1969. The

only thing that the District Court could know, if he did, was that the total amount of the settlement was fair. After plaintiffs' attorneys obtained a "computer print-out", they lodged it with the Court and they mailed to each individual the amount of his proposed settlement. Information was not distributed by the formal notice to all members of the class as to the amount of money all other members of the class would receive. Would not this information have been of great value to the members of the class to examine the fairness of the formula? The availability of the computer print-out was not made known to anyone who did not have the know-how to inspect the records of the Clerk. In this connection most of the class lived in other parts of Florida, not in Jacksonville.

8. The possibility of a conflict of interest was not mentioned at the hearing of March 11, 1969, since Petitioners depended upon representation by their original attorneys. At the second hearing under Rule 60(b) the matter was raised by new counsel pursuant to the sometimes melancholy duty of lawyers to say what must be said. The Rule 60(b) motion said, in substance, that the attorneys' representation of IARE in an undisclosed representation of intervention which produced a quickie collective bargaining agreement was in light of past events in other litigation a conflict of interest. The District Court answered the matter by ruling that it had not yet been actually *adjudged* in any case that a conflict of interest existed between the men and their collective bargaining agent. But this claim had been alleged by the very attorneys who brought the suit, and in another case it had been held by the same District Judge that this same collective bargaining agent had waived the individual accrued claims of these members without express consent

in matters of time claims and seniority rights. *Harrison v. F.E.C. Ry. Co.,* No. 65-366-Civ.-J decided August 8, 1967.

Under these circumstances the District Court should not have held that the Petitioners and the other members of the class were bound by the acts of their attorneys because they should have realized a need of finding substitute attorneys since the potential conflict of interest between attorney and client was not sufficiently disclosed by the Rule 23(e) notices which were sent to the members of the class.

9. Absolute admiration is due for the professional skill and stamina of the attorneys who brought the case to a point of $800,000 settlement. However, the purpose of a class action suit is not the recovery of fulsome attorneys fees. We must be mindful of the position of the men, for example, Petitioner Walter J. Howard. This ring leader in the suit found himself the recipient of an estimated $5,287, less 1/3 attorney's fee, payable over a two-year period. He filed an affidavit that the recovery is about 1/5 of his own estimate of his lost wages after he had sustained the litigation for a period of three years. This Petitioner objected at the first hearing and did not cash his recovery check. At all times this Petitioner has been told that the class action was compulsory as to him, that he could not proceed alone, and that he could not ask for more money without prejudicing the recovery of the other men.

10. It was error for the District Court to treat this as a case of estoppel and ratification by the acceptance of the first installment by most of the men. (The other

installments are still intact pending the conclusion of this case). Under all the complex circumstances of the case, including geographical considerations, Petitioners did well to find other counsel who were able to inform themselves sufficiently to file a notice of appeal on the 29th day following March 11, 1970. The distribution of the first installment 19 days after the approval of the compromise was the act indeed of the proponents of the compromise and of the Court. Therefore, in the face of known dissent, the money was knowingly disbursed within the thirty-day period of direct appeal. Furthermore, since only a part of the money has been distributed it is entirely possible that no one has actually been unjustly enriched and likewise possible that FEC has not been in any respect harmed. All this is a subject to be explored hereafter upon investigation of the entire settlement and disbursement situation. But the District Court treated the estoppel and ratification as the practically automatic consequences of the cashing of the first check. Largely for this, the Court did not go into Petitioners' claims of inequity as to their respective recoveries.

11. Compromises under Rule 12(e) characteristically involve the exercise of good judgment in the matter of disclosure and non-disclosure in the formal notices of those facts and circumstances which are of interest to the members of the class. Non-disclosure as a form of misrepresentation is well known under the Securities and Exchange Commission Acts and the mail fraud statutes. Even though entirely inadvertent in this case, non-disclosure has an important effect upon the intelligence with which members of the class react to the compromise proposal. In this case members of the class were referred

to the office of the Clerk of the Court where they could learn the formula for settlement, the amounts proposed to be received by each member of the class, etc. Also, it was in the Clerk's office that knowledge would come to the members of the class of the representation by their attorneys of the I.A.R.E. in its intervention. Also, the quid pro quo significance of the collective bargaining agreement and the motives of I.A.R.E. in providing this settlement link so quickly are all matters that the members of the class would have to deduce. This case, therefore, presents problems concerning the affirmative obligation of the court to supervise carefully the information transmitted in the formal notices. Especially would this be so where members of the class are working people. Even more so would this be so where members of the class live mostly in other cities. This case, therefore, presents important questions concerning the meaning of "notice" under Rule 12(e). The Rule imposes upon the Court the obligation to determine the manner of the notice but it does not sufficiently spell out the completeness of it.

12. The vital problem here presented to the Supreme Court is the overall healthy operation of Rule 23. The exercise at this time of this Court's supervisory power over the operation of Rule 23(e) is indispensable to avoid misunderstandings, disappointments, and rumors of irregularities committed under the auspices of federal courts. This case is proof that guidance is now needed to establish for the District Courts highest standards of procedural care for thorough investigation of claims and equities by the various members of the class before they are to be foreclosed by Rule 23 compromises.

CONCLUSION

For the reasons stated it is respectfully submitted that Petitioners' Petition for a Writ of Certiorari should be granted.

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APPENDIX A

DISTRICT COURT OPINION

MUNGIN

v.

FLORIDA EAST COAST RAILWAY COMPANY

318 F. Supp. 720 (1970)

FINDINGS OF FACT

SCOTT, District Judge.

1.

Plaintiffs are individuals, residents of Florida, who were former employees, or are present employees of Defendant.

2.

Intervenor, International Association of Railway Employees (hereinafter IARE) is a labor organization within the meaning of the Railway Labor Act, 45 U.S.C. Sections 151-188, and is also, within the meaning of that Act, the duly certified representative of the craft or class of locomotive firemen employed by Defendant.

3.

Defendant, Florida East Coast Railway Company, Inc., (hereinafter FEC) is a "carrier" within the meaning of the Railway Labor Act and is a Florida corporation doing business within the Middle District of Florida and having its main office at St. Augustine, Florida.

4.

In November, 1967, Plaintiffs commenced the present action against Defendant alleging violations of the Railway Labor Act and the wholesale abrogation by Defendant of its collective bargaining agreements with IARE. On March 22, 1968, this Court dismissed the complaint for lack of jurisdiction. On September 22, 1969, the United States Court of Appeals for the Fifth Circuit overruled the dismissal of this court, finding that the court had jurisdiction and that the complaint stated a cause of action, and remanded the case for further proceedings in compliance with its opinion. Mungin v. Florida East Coast Ry. Co., 416 F.2d 1169 (5th Cir. 1969). On December 22, 1969, this court denied certain motions of Defendant to dismiss, to strike and to sever, and to stay pending disposition of a writ of certiorari, and ordered Defendant to answer the complaint on or before January 30, 1970. No answer has yet been filed. As of December 30, 1969, an application for additional time to petition for writ of certiorari was pending in the United States Sureme Court.

5.

Between approximately December 17 or 18, 1969, and December 29, 1969, various discussions between counsel for Defendant and counsel for Plaintiffs[1] were held con-

1. Through March 11, 1970, and apparently until on or about April 4, 1970, all the named Plaintiffs, plus some 20 or so additional members of the class were represented by Allan Milledge, Esquire, and Richard L. Horn, Esquire, of the firm of Milledge & Horn. All references to Counsel for Plaintiffs hereafter are to Milledge & Horn. New counsel were engaged by some plaintiffs, starting on or about April 4, 1970. These counsel, who are Chris Dixie, Esquire, of Houston, Texas, and Hardee, Ott & Hamilton, P.A., of Tampa, Florida, are referred to hereafter as Counsel for Movants.

cerning settlement of this case and an agreed settlement was reached on December 29, 1969.

6.

On December 30, 1969, a hearing in this case was held before The Honorable Charles R. Scott, Judge of this Court, concerning certain motions in the case and preliminary aproval of the agreed upon settlement.

7.

On December 30, 1969, the Plaintiffs moved this Court for permission to amend their complaint to state a cause of action on behalf of a class composed of all employees or former employees of the Defendant Florida East Coast Railway Company who held seniority in the craft or class of Locomotive Firemen on January 23, 1963, or thereafter to date, and who were available, qualified, entitled and willing to perform work as Locomotive Firemen for the Defendant Railway since January 23, 1963, and would have performed such work but for illegal conduct of the Defendant Railway as alleged in their complaint. Such amendment was allowed by this Court and was filed.

8.

On December 30, 1969, IARE filed a motion seeking to intervene in this action as a party Plaintiff and said motion was granted by this Court and IARE did intervene and did file its complaint in intervention. The complaint of IARE was substantially identical in its allegations with the complaints already filed by Plaintiffs.

9.

On December 30, 1969, Plaintiffs and IARE moved this Court for a determination under Rule 23, Federal Rules of Civil Procedure, that this suit could be maintained as a class action. This Court granted said motion, allowing the suit to be maintained as a class action under Rule 23(b) (1) and (b) (2) on behalf of the class as set forth in the amended complaint of Plaintiffs.

10.

On December 30, 1969, the Plaintiffs, Intervenor, and Defendant applied to the Court for preliminary approval of a compromise of the class action, and following a hearing in which the proposed compromise was fully explained to the court, such preliminary approval was given. An order was entered directing that the Defendant pay over to a trust fund the sum of $800,000, that said trust be maintained pending a hearing on final approval of said proposed settlement, and that notice of such final hearing, in the form prescribed by the Court, be given to all members of the class.

11.

The stipulation of settlement filed in this Court on December 30, 1969, stated that if said settlement were not finally approved by this Court or if this case were not finally dismissed without payment by Defendant of any further sums, then the entire trust funds, together with accumulated interest, should be immediately refunded to Defendant without further order of the Court. The Trust Agreement also provided that the trust was created subject to the express condition and reservation on the

part of the Defendant as grantor that the Agreement could be revoked in full if the proposed settlement was not finally approved by this Court or if this case was not finally dismissed without payment by the Defendant of any further sums.

12.

Also on December 30, 1969, and as a part of the overall settlement, Defendant and IARE entered into a Memorandum of Agreement providing for the abolition of the craft or class of Locomotive Firemen and the availability of promotional opportunities for the members of said craft or class into operating positions of the Defendant under the then existing Uniform Working Agreement governing operating employees of Defendant. The Memorandum of Agreement further provided that it should take effect only upon final approval of this Court of the settlement reached in this case and provided that if said settlement was not finally approved, the Memorandum of Agreement would be null and void.

13.

On December 30, 1969, the Defendant did pay into the hands of the Trustees of the trust the sum of $800,000 and said was deposited by the Trustees at interest with the Florida National Bank of Jacksonville, Florida, as shown in the First Report of Trustees filed in this Court on January 8, 1970.

14.

On February 5 and 6, 1970, Notices of the Final Hearing, in the form ordered by this Court, were sent to all

members of the class, as were statements from the Trustees showing for each member of the class his entitlement to share in the fund including the amounts payable to each such individual on the three pay-out dates of April 1, 1970, April 1, 1971, and April 1, 1972.

15.

The Notice of Final Hearing stated that an application was pending for approval of a compromise of this action under which the Defendant would pay into the trust fund sums in full settlement of any and all liability; stating that a hearing had been held on the preliminary advisability of the settlement and the Court had preliminarily approved the settlement and the sums had been paid into the trust fund; stating that a hearing on the final advisability of the settlement would be held before The Honorable Charles R. Scott at the United States Court House in Jacksonville, Florida, on the 11th day of March, 1970, at 10:00 a. m. at which time all interested parties may be heard; and further stating that

> The original complaint in this action, a motion to amend that complaint, a motion for intervention, a motion to allow maintenance as a class action, orders granting said motions, and a full copy of the Stipulation of Settlement and amendment thereto, including a copy of the Trust Instrument establishing the 'F.E.C. Firemen's Trust Fund' and amendment thereto, and a copy of an Agreement between F.E.C. and IARE concerning abolition of the craft of Locomotive Firemen and eligibility for promotion of employees holding seniority as Locomotive Firemen as of the effective date of the Agreement to operating

positions with F.E.C. are on file in the office of the Clerk of United States District Court for the Middle District of Florida in Jacksonville, Florida, and may be examined by you there.

16.

Between December 30, 1969, and March 11, 1970, various meetings were held by counsel for Plaintiffs with the various members of the class to explain to them the terms of the settlement. These meetings were held in Miami, Florida, on or about January 10, 1970, in New Smyrna Beach, Florida, on or about January 11, 1970, in Jacksonville, Florida, on or about January 11, 1970, in New Smyrna Beach on or about January 15, 1970, in Miami on or about March 7 or 8, 1970, and in New Smyrna Beach on or about March 10, 1970. In addition, there were phone calls and correspondence between various members of the class and counsel for Plaintiffs.

17.

On March 11, 1970, a hearing was held in this Court concerning the final advisability of the proposed settlement, pursuant to the earlier orders of this Court and the terms of the notices sent to the members of the class. Present at that hearing, according to their affidavits, were the following Plaintiffs (now also Movants) who now seek to set aside the settlement: Henry Allen Crump, Arthur L. Davis, Walter J. Howard, Leandrus Jorden, Harold Marshall, Gordon Rogers, and according to his statement in open court on June 29, 1970, also present was Moses Meeks. According to the affidavit of Gordon Rogers, there were more than 15 individual Plaintiffs who attended the hearing on March 11, 1970.

18.

At the hearing on March 11, 1970, three Plaintiffs (now also Movants), Walter J. Howard, Henry Allen Crump, and Leandrus Jorden, testified that they were dissatisfied with the amounts of money which they would individually receive under the proposed settlement. Each of them was informed by the Court that the Court could approve the settlement for all or for none, and each was asked whether he wished to have his complaint considered as one against the entire settlement and as a basis for possibly blocking the entire settlement. Each replied that he did not. No other Plaintiffs or present Movants who were present in the court room requested permission to speak, voiced objection to the settlement, or complained of any other matters now asserted by them as a basis for setting aside the settlement.

19.

No Plaintiff or Movant at any time prior to the filing of the present Motion on May 29, 1970, alleged to the Court that he had not given prior authorization to his attorneys, Milledge and Horn, to settle the case.

20.

No Plaintiff or Movant prior to May 29, 1970, alleged to the Court in any manner that he did not understand the terms of the settlement, or was unaware of the existence of the Memorandum of Agreement between IARE and FEC, or that he had not had an opportunity to examine the documents on file with the Court, or that his attorneys had failed adequately to explain the terms of

the settlement to him, or that he did not know that IARE had intervened, or that he did not know that his attorneys also represented IARE, or that he objected to such representation.

21.

Of the more than 200 members of the class, including 126 members who would share in varying amounts in the proceeds of the settlement, only the three individuals named above voiced any objection to the settlement either by written communication to the Court or by oral testimony on or before March 11, 1970.

22.

On March 31, 1970, checks were mailed by the Trustees to each of the members of the class who shared in the proceeds of the settlement[2] according to the time table for payments set forth under the terms of the settlement. The mailing of these checks, and the withholding by attorneys Milledge and Horn of their attorneys' fees awarded them by the Court, amounted to a total of nearly $300,000 paid out of the fund in settlement.

23.

Of the 24 individual Plaintiffs who are now listed in the Notice of Appeal in this case and/or in the present Motion for Relief from Judgment as being represented by Chris and Dixie, Esquire, and Hardee, Ott and

2. The only exception was where the original class member was deceased and no duly appointed legal representative of his estate was available to accept the payment.

Hamilton,[3] and as being opposed now to the settlement and as now seeking to set same aside, the following actions took place in regard to the April 1 pay-out:

a) Eddie J. Byrd received no check as according to the records of the Trustees, he did not hold firemen seniority with FEC as of January 21, 1963, or thereafter, and was therefore not entitled to share in the settlement.

b) Douglas Oliver, a Plaintiff, was deceased and his widow had not procured certified letters of administrations or of administration unnecessary, and in accordance with advice from this Court to the Trustees no funds were paid to his heirs or estate until such letters of administration or of administration unnecessary were procured.

c) Walter J. Howard and Moses Meeks received checks, but have not cashed same nor have they unconditionally tendered same back to the Trustees, to FEC, or to the Court.

d) Willie E. Jordan, James F. Fennel and Johnny Thomas cashed their checks on April 2, 1970.

e) Leandrus Jorden and J. Y. Jackson cashed their checks on April 3, 1970.

f) H. A. Crump, Gordon Rogers, James L. Sims, John C. Peoples and Arzy Rogers cashed their checks on April 6, 1970.

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3. Apparently in early April, 1970, and at various times thereafter, a number of the class members originally represented by Milledge and Horn discharged them and engaged the services of Chris Dixie, Esquire, of Houston, Texas, and also Hardee, Ott & Hamilton, P.A., of Tampa, Florida. At the hearing on June 29, it was stated that a total of 26 such individuals were then represented by those new counsel. See footnote 1, *supra*.

g) Willie J. Alderman and Harvey Williams cashed their checks on April 7, 1970.

h) O. C. Carter, Jr. and Mose Reese cashed their checks on April 8, 1970.

i) Arthur L. Davis and Chanel N. Mitchell cashed their checks on April 13, 1970.

j) Harold A. Marshall cashed his check on April 21, 1970.

k) Robert W. Wilson cashed his check on May 25, 1970.

24.

Arzy Rogers, according to his affidavit, after learning of the settlement agreement, requested and received from the Defendant permission to take a physical examination for employment and was notified that he had not passed said physical. At his request, he was given permission to see a neutral doctor, which was required by the Memorandum of Agreement between IARE and FEC, but refused to follow that procedure because of his understanding that this was pursuant to the terms of a contract or mediation agreement which had been thrown out in an earlier case.

25.

To date, the only offer to return any money paid out made by any of the members of the group now seeking to set aside the judgment is contained in paragraph 13 of the present motion for relief from judgment which reads in its entirety "Plaintiffs state that, in the event this Court should set aside the Judgment of March 11,

approving the settlement, all Plaintiffs represented by undersigned counsel stand ready and able to return to the Court those funds already received by them pursuant to the settlement terms." No actual tender of monies has been made up to the present time to the Trustees, the Defendant, or the Court of said funds nor has any offer of any type been made to return to the Trustees, the Defendant, or the Court, the entire sum of almost $300,000 paid out on April 1, 1970.

26.

The first attempt that any of the Plaintiffs made to set aside the Judgment, was apparently a letter of April 4, 1970, to Chris Dixie, Esquire, of Houston, Texas. This letter stated that the signing Plaintiffs were dissatisfied with the outcome of the Court proceedings on March 11, 1970, and asked that Mr. Dixie represent them in their "quest for proper relief for illegal acts against us that were perpetrated against us by the Florida East Coast Railway Company, Inc., a Florida corporation." This letter was signed by W. J. Howard, Moses Meeks, Arzy Rogers, Gordon Rogers, James L. Sims, Arthur L. Davis, Leandrus Jorden, Chanel N. Mitchell, W. J. Alderman, W. E. Jordan, H. A. Crump, R. W. Wilson, J. T. or J. I. Thomas of 518 Washington Street, James Fennel, and Harvey Williams. Also, there apparently was a telephone call to Percy Foreman, Esquire, who referred the Plaintiffs to Chris Dixie, Esquire, but the time of this phone call was not established.

27.

On April 10, 1970, a Notice of Appeal was filed with the clerk of this Court in Tampa, Florida, on behalf of

Walter J. Howard, Leandrus Jorden, Arthur L. Davis, Willie E. Jordan, Gordon Rogers, Moses Meeks, James L. Sims, and H. A. Crump.

28.

Approximately two weeks after the Notice of Appeal was filed, representatives of Hardee, Ott and Hamilton first met with some of the Plaintiffs who are now seeking to set aside this settlement. Not until approximately one week before the present Motion was filed under Rule 60(b) did a representative of Hardee, Ott and Hamilton, Mr. Capelle, examine the file in this case in this Court.

29.

On June 1, 1970, the present motion for relief from judgment was filed in this Court on behalf of the Plaintiffs who filed the Notice of Appeal, and also alleging that the following Plaintiffs had discharged Milledge and Horn and had retained Hardee, Ott and Hamilton to prosecute the Appeal and all matters related thereto: Willie J. Alderman, O. C. Carter, Jr., Eddie J. Byrd, James F. Fennel, J. Y. Jackson, Harold A. Marshall, Chanel N. Mitchell, D. Oliver, John C. Peoples, Mose Reese, Arzy Rogers, Johnny Thomas, Harvey Williams, and Robert W. Wilson.

30.

At the hearing of the present Motion on June 29, 1970, Counsel for the Plaintiffs presently seeking relief from the judgment stated that their motion was based on Rule 60(b) (2) and (b) (6), Federal Rules of Civil Procedure, Counsel also stated that the class suit deter-

mination by this Court, made December 30, 1969, appeared to be authorized by the earlier opinion of the Court of Appeals for the Fifth Circuit in this case.

31.

The lack of prior authorization of attorneys Milledge and Horn to settle this case and the matters concerning an alleged failure by Milledge and Horn to adequately explain the terms of settlement were matters within the actual knowledge of the Movants on or before March 11, 1970. By the notice of final hearing, Movants had actual knowledge that a class suit was pending, that a memorandum of agreement between I.A.R.E. and F.E.C. which abolished the class had been signed, and that a settlement was pending final approval, and that someone had intervened in the lawsuit. The Movants had constructive knowledge, binding upon them, of all matters of which they now complain which they could have learned by examining the files of this Court in this case on or before March 11, 1970, as the notice of final hearing specifically stated that all such papers could be examined, and told the Movants where they could be examined, and no evidence has been forthcoming to show that any attempt to examine such papers was made.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this case and of the parties under 45 U.S.C. §§ 151-188, 28 U.S.C. § 1337 and under 28 U.S.C. § 1331.

[1] 2. This Court has jurisdiction to entertain and deny this motion under Rule 60(b) even after an appeal has been taken. Ferrell v. Trailmobile, Inc., 223 F.2d 697

(5 Cir., 1955); 7 Moore's Federal Practice, paragraph 60.30(2) and cases there cited.

[2-4] 3. The allegations of the 75 individual plaintiffs who were original parties to this suit show clearly that all the 75 individual counts were based on a common set of facts concerning alleged common positions taken toward the entire class by the defendant. The claims of the representative plaintiffs were apparently typical of the claims of the entire class. The plaintiffs, who had already established through an appeal that their claims stated a cause of action and were within the jurisdiction of this Court, obviously were fairly and adequately protecting the interest of the entire class. The class was so numerous that joinder of all members thereof was impractical, there being over 200 employees who held seniority as locomotive firemen as of February 23, 1963. There were obvious common questions of law and fact concerning the rights of the class to damages and to other appropriate relief for alleged violations of the Railway Labor Act. Defendant allegedly had acted and refused to act on grounds allegedly applicable to the class. As the Court of Appeals held, it was open to this Court to determine whether injunctive relief was appropriate upon full hearing with respect to the class as a whole. The possibility of such relief being granted appeared highly likely if the allegations of the plaintiffs could be established. It was strongly probable, almost inevitable, that adjudications as to the 75 individual plaintiffs would, as a practical matter, be dispositive of the interests of all the other members of the class or craft of locomotive firemen and might interfere with or impede the ability of those nonparty craft or class members to protect their interests. Furthermore, there was the risk of inconsistent or varying adjudications with respect to the rights of indi-

vidual members of the craft or class in regard to back pay, reinstatement, etc. The possibility of incompatible standards being imposed upon the defendant did exist. As the Court of Appeals recognized in its opinion in this case, this claim was "even more so, a claim on behalf of the entire craft whether represented or not." Mungin v. Florida East Coast Railway Co., *supra,* at 1178. In these circumstances, the class action could be maintained under Rule 23(b) (1) and (2) of the Federal Rules of Civil Procedure as this Court found. The weight of authority supports the propriety of this determination. Mungin v. FEC, *supra,* at 1175, 1177-1178; Jenkins v. United Gas Corporation, 400 F.2d 28 (5 Cir., 1968); Clemens v. Central Railroad Company of New Jersey, 264 F.Supp. 551 (E.D.Pa.1967). Further, as a practical matter, since the determinations of the rights of the 75 individual plaintiffs would almost surely establish the rights of the other class members and there posibly would be involved considerations of how to restore the *status quo ante,* assuming the plaintiffs proved their case, the Court was faced with the requirement that relief for the entire class and restoration of that *status quo ante,* if appropriate, could not be limited in its operative effect to just the 75 plaintiffs and neither could the relief be so limited as to expressly or impliedly authorize continued unlawful treatment of the rest of the class besides the 75 individual plaintiffs. In this situation, a class action was the only appropriate vehicle under which the Court could proceed. *Cf.* Potts v. Flax, 313 F.2d 284 (5 Cir., 1963). It may be argued that the class action in this case could have been maintained under Rule 23(b) (3) and that may be so. However, as noted above, this suit was clearly maintainable under other sections of the rule. When such options are available, the Court should

treat the action as one under Rule 23(b) (1) or (b) (2) instead of under (b) (3) in order to achieve the purposes of the Rule which are to avoid a multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications. Van Gemert v. Boeing Company, 259 F.Supp. 125 (S.D.N.Y. 1966); 3B Moore's Federal Practice, paragraph 23.31(3). I conclude that the class action determination previously made herein on December 30, 1969, was proper.

[5, 6] 4. I further find that I.A.R.E., as the duly certified statutory bargaining respresentative of the craft or class of locomotive firemen of F.E.C. was entitled to intervene in this case as a matter of right as I have heretofore determined in my Order of December 30, 1969, allowing such intervention. I.A.R.E. sought in its intervention the same relief for the same alleged violations as had the original plaintiffs. Neither from the entire evidence before me on December 30, 1969, or March 11, 1970, did any "vigorous controversy" or "dual voices", see Mungin v. Florida East Coast Ry. Co., *supra,* 416 F.2d at 1178, fn. 34, appear and no reason was apparent to this Court, then or now, for imposing any restriction upon I.A.R.E. intervention. Neither did any conflict of interest on the part of Milledge & Horn exist in the mind of the Court where they represented two parties both of whom sought the same end and one of whom, I.A.R.E., was under a statutory duty of fair representation. The fact that some 26 of over 200 members of the craft or class now object apparently to what I.A.R.E. did by signing the Memorandum of Agreement with F.E.C. raises no substantial doubts in the mind of the Court as to the fairness of I.A.R.E. representation. Benefit flowed both ways in that agreement which dealt with a matter long festering in the railroad

world, the use of firemen on diesel locomotives, which has been the object of extensive bargaining and Congressionally imposed arbitration, see Florida East Coast Ry. Co. v. Brotherhood of R. Trainmen, 336 F.2d 172, at 175-177 (5 Cir. 1964), cert. den. 379 U.S. 990, 85 S.Ct. 703, 13 L.Ed.2d 611 (1965) and Public Law 88-108, 77 Stat. 132, and is currently again under consideration by a Presidential Emergency Board convened under Section 10 of the Ralway Labor Act, see 74 Labor Relations Reporter 261-262 (July 13, 1970). In this historical context and the circumstances and facts of this case, it appears on this record that I.A.R.E. has only exercised its recognized discretion in bargaining for all whom it represents, making such compromises as to it appeared to be in the best interests of all. The complete satisfaction of every member of the craft or class is scarcely to be expected, especially on such an issue as this one. To date nearly 90% of those represented have not objected to what was done, a fact which goes far to show that what was done was reasonable and proper. See Ford Motor Co. v. Huffman, 345 U.S. 330, at 337-338, 73 S.Ct. 681, at 686, 97 L.Ed. 1048 (1953); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); Humphrey v. Moore, 375 U.S. 335, at 349-350, 84 S.Ct. 363, at 371-372, 11 L.Ed.2d 370, at 381-382 (1964); Mungin v. Florida East Coast Ry. Co., *supra,* 416 F.2d at 1178. The present Movants have also pointed to this Court's decision in Harrison v. Florida East Coast Ry. Co., No. 65-366-Civ-J, decision entered August 8, 1967, as showing that I.A.R.E. was so derelict in its statutory duties that some restriction should have been imposed on it or that representation of I.A.R.E. by Milledge & Horn was improper. That case did not involve any finding of any breach of

statutory duties of fair representation nor did it basically involve any breach of duty in negotiating a collective agreement having prospective application. The Court therein found that I.A.R.E. waived, without express consent, individual accrued claims of its members and that, since the contract was entire, certain settlements of outstanding Section 6 notices (which I.A.R.E. had apparent authority to negotiate and which merely went to withdrawal or postponement of those notices) which were part of the total contract had to fall with the entire contract. The contract did not concern abolition of the craft, nor did it fail because of any breach of statutory duties, but solely because of the lack of individual authorizations which the Court thought were required under the holding in Elgin, J. & E. Ry. Co. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed 1886 (1945), aff'd on rehearing, 327 U.S. 661, 66 S.Ct. 721, 90 L.Ed. 928 (1946). No showing of I.A.R.E. bad faith was made in that case, but apparently I.A.R.E. acted in good faith, albeit without proper authorization. I conclude that nothing connected with the I.A.R.E. intervention, the conditions of that intervention, or I.A.R.E. representation by Milledge & Horn is a sufficient basis for granting the present motion.

[7-9] 5. An attorney "has authority to determine what proceedings he will institute" and "has the exclusive management and control of the action and of all steps and proceedings taken therein to enforce the rights and remedies of his client." He controls the procedures in the case and can do whatever he feels necessary or proper in his client's behalf at least so long as his acts affect the remedy only and not the cause of action. 7 Am.Jur.2d "Attorneys at Law", §§118, 120. I conclude that Milledge & Horn properly acted within the scope of their authority as at-

torneys of record in amending the plaintiff's complaint to state a class action, in not opposing the intervention of I.A.R.E., and in moving the Court for a class action determination on December 30, 1969, and that these acts are not grounds for granting relief from the judgment.

[10-12] 6. This Court having determined that this case was properly maintainable as a class action under Rule 23(b) (1) and (b) (2) of the Federal Rules of Civil Procedure, the only notice to the class thereafter required was one of any proposed dismissal or compromise. Such notice must be given to all members of the class in such manner as the Court directs under Rule 23(e). All members of a class are bound by judgment where the action is maintained under Rule 23(b) (1) or (b) (2). Other notices are in the discretion of the Court under Rule 23(d). Only if the action is maintained under Rule 23(b) (3), which is not the case here, is there any requirement that the class members be given notice of a right to request exclusion from the class or the right to enter an appearance individually through their own counsel. Since the class action was properly maintained under Rule 23(b) (1) and (b) (2), no member of the class had any right to withdraw from the class. Therefore, there was no requirement nor authority for this Court to notify any members of the class that they had such an option to withdraw or be bound by any judgment. Neither was the Court of the opinion that there was any necessity to inform the members of the class that they could be separately represented by other counsel than Milledge & Horn, or of any specific right to object to the settlement. Prior to the March 11th hearing, the Court received only two letters from individual members of the class, both of which concerned themselves primarily with a complaint

that these individual members were not receiving enough money and that they opposed a class action, rather than individual lawsuits and individual treatment of each member of the class. Presumably, these men knew how to find other lawyers when they wanted to, as they were able to do so after March 11th. They were not illiterates or juveniles, but those who complained at the March 11th hearing were all mature men with long working experience who were all high school graduates. Their letters and their testimony make clear the level of their intelligence and the basis of their objections gave the Court no reason to believe that it had any duty to inform them of any right to hire other lawyers to represent them. Thus, any failure to notify the class members of a nonexistent right to "opt out" or of a right to be represented separately cannot be a basis for any relief from the judgment in the circumstances of this case, and I so conclude.

[13] 7. The hearing of December 30, 1969, concerned itself, so far as dismissal or compromise was concerned, solely with a *preliminary* approval of the compromise so that monies could be paid into the Trust Fund by defendant prior to December 31, 1969, under Order of this Court, and so that a time might be set for a final hearing on this matter, with appropriate notice to all members of the class in order to enable them to come forward with any objections to the proposed settlement. No part of the settlement was finally approved or given final effect as a result of the December 30th hearing. Rather the settlement agreement itself, the Trust Fund created under it, and the Memorandum of Agreement between I.A.R.E. and F.E.C. were all expressly conditioned upon final approval of the settlement and dismissal of the case without the payment of further sums by the defendant. Had the

settlement not been finally approved, none of these agreements would have been effective, but by their express terms would have been revoked and rendered null and void. Thus, the December 30th hearing was solely interlocutory in nature, looking toward a later hearing at which the Court could decide on the basis of all the evidence then before it, whether the settlement should or should not be finally approved. No notice was required under the Federal Rules for such an interlocutory hearing nor the entry of such interlocutory orders as occurred on December 30, 1969. *Cf.* Cunningham v. English, 106 U.S. App. D.C. 92, 269 F.2d 539 (1959), cert. den. 361 U.S. 905, 950, 80 S.Ct. 400, 4 L.Ed.2d 383 (1959). I conclude that the failure to give notice of the December 30th hearing to the members of the class is not a basis for relief from the judgment.

[14] 8. The members of the class were formally apprised of the March 11th hearing at least 30 days prior thereto by the notices, in the form prescribed by the Court, which were mailed by the Trustees, Milledge & Horn, on February 4 and 5, 1970, to all members of the class.[1] The notice prescribed by the Court clearly stated that only preliminary approval had been entered, that final approval was still an open question, and that anyone who wished to be heard on March 11th would be heard. It further informed the members of the class that an amendment making the suit a class action had been allowed, that a motion to maintain the suit as a class action had been granted, that a proposed settlement agreement had been

1. Also, of course, many members of the class, as shown by the affidavits submitted in support of the present motion, received actual notice of the proposed settlement through the meetings held by Milledge and Horn in Miami, New Smyrna Beach and Jacksonville in mid-January and early March, 1970.

written and signed, that a trust fund had been created, that there had been an intervention in the suit, and that a contract concerning abolition of the craft or class of firemen and promotional opportunities for members of that class had been entered into between I.A.R.E. and F.E.C., and that all of these matters were involved in the final approval. It also informed all members of the class where these documents were and that they could be examined. At the time the Court ordered the giving of notice, there was no evidence before the Court of any type of dissension among the class nor of any lack of cohesiveness or unity in the class nor any evidence to indicate that the representation of the class was ineffective. At no time prior to the hearing on March 11th, except for the letters from Mr. Crump and Mr. Howard, was any disagreement with the proposed settlement brought to the attention of the Court by any member of the class, nor was any communication addressed to the Court requesting advice as to the rights of any member of the class to oppose the settlement or to be represented separately through different counsel. The Court finds that both the timing and content of the notice of final hearing was sufficient to apprise all members of the class of the matters involved in the March 11th hearing, and to put them on actual, or at the very least, binding constructive notice of such matters and complied with Rule 23. Any failure thereafter by them to make further investigation cannot be any basis for relief from the judgment.

[15, 16] 9. It is a requirement under Rule 60(b) that any motion seeking relief thereunder "shall be made within a reasonable time." The Rule postulates a maximum one-year time when relief is sought under Subsections (b) (1), (2) and (3). The movants here purport to rely

on Subsections (b) (2) and (6), that is, respectively, "newly discovered evidence which, by due diligence, could not have been discovered in time to move for a new trial under Rule 59(b)"; and "any other reason justifying relief from the operation of the judgment." The Court finds that, in the circumstances of this case, such motions were not made "within a reasonable time." The factors that underlie this conclusion are that (1) nothing that was done on December 30, 1969, was in any sense final, but rather all that was done could be undone and all that was done was predicated upon final approval of the settlement to be made at a later time following notice to all members of the class; (2) most members of the class had notice through reading newspaper accounts in early January, 1970, and through meetings with their attorneys, Milledge & Horn, between the middle of January and the middle of March, 1970, that a settlement was pending and that a further hearing concerning the final approval of that settlement would be held; (3) all members of the class received formal notice, in the form prescribed by the Court, which informed them of the various proceedings on December 30th, the hearing on March 11th, the subject of that hearing which was final approval of the settlement; the fact that there would be a first payout on April 1, 1970, if final approval was forthcoming; the fact that a collective bargaining agreement concerning abolition of their craft and their promotional opportunities to other operating positions existed; the fact that all the interested parties could be heard on March 11th; and the fact that any and all documents concerning these matters were on file with this Court and could be examined by them; (4) the notices from the trustees concerning shares of the individual members of

the class clearly showed to each member the crucial April 1, 1970, first payout date and all members of the class were aware of the crucial date; (5) no individual plaintiff in any way asserted to the Court prior to the March 11th hearing or at that hearing that their attorneys, Milledge & Horn, did not have authority to enter into this settlement, or that they disapproved in any manner Milledge & Horn's actions with regard thereto, or that they had been misinformed or not fully informed by Milledge & Horn in regard thereto except as to the extent noted above of the three plaintiffs who testified that they individually were dissatisfied with their share and felt that their individual cases merited separate consideration, although they did not wish to block the entire settlement for the entire class; (6) all members of the class, including the present movants, were aware through the trustees' notice to them in early February that there would be a payout on April 1, 1970, of approximately one-third of the sum paid in the settlement, but no action was taken by any individual plaintiff before this Court in any way to impugn the settlement or object to it or object to the Court's approval until the filing of the notice of appeal on April 10th; (7) of the eight individuals who joined in the notice of appeal, five had already cashed their April 1st checks at the time the notice of appeal was filed (H. A. Crump, Willie Jordan, Leandrus Jorden, Gordon Rogers and James L. Sims); (8) Arthur L. Davis, who was on the notice of appeal, cashed his check three days after the notice of appeal was filed; (9) Moses Meeks, although he did not cash his check, was present at the hearing on March 11th, and voiced no objection to the settlement, and did not make any objection to any actions taken by Milledge & Horn; (10) Walter J.

Howard, although he has not cashed his check, was present at the hearing on March 11th and only testified to the extent shown above; (11) of the fourteen other individuals listed in the present motion, twelve of them cashed their checks prior to this motion being filed, even though, of these twelve, seven had joined in the April 4th letter to Chris Dixie, Esquire, together with the eight who were listed in the notice of appeal (12) and of this group nine cashed their checks before the notice of appeal was filed; and (13) all evidence now relied upon was within the actual or constructive knowledge of the present movants before March 11, 1970. The failure by these individuals to exercise their opportunity to bring to the attention of the Court objections they now urge to the settlement, or to apprise the Court of their disapproval of its final approval of the settlement prior to the April 1st payout, resulted in the payment of nearly $300,000 to various members of the class and to Milledge & Horn, pursuant to the terms of the settlement of which these present movants were well aware. Further they have, in substantial part, accepted the fruits of the settlement which they now seek to set aside. That they have remained silent or cashed their checks because of pressing individual needs does not excuse their failure to act in an earlier time. In the circumstances of this case, their failure to file their motion until May 29th, when coupled with their earlier silence, their limited objections, their acceptance of the fruits of the settlement, and their failure to repudiate the acts of their attorneys of record, make the timing of the present motion unreasonable. There has been no convincing explanation of the delay by these movants, but on the contrary, the explanations furnished are totally inadequate. This record shows only inaction, neglect, and dilatoriness

on the part of the movants. Too much has happened, with full knowledge of these movants and without objection on their part, for them now to claim that their motion comes within a reasonable time. Where a party, through his silence or inaction, and with knowledge of the facts, or with such knowledge available to him and not used, allows intervening events to occur pursuant to the judgment which radically alter the position of the parties, and no convincing explanation of his delay in raising his objections is forthcoming, the motion under Rule 60(b) is not timely and I so find that this motion comes too late. Goldfine v. United States, 326 F.2d 456 (1 Cir. 1964); Di Vito v. Fidelity and Deposit Co. of Maryland, 361 F.2d 936 (7 Cir. 1966); Federal Enterprises v. Frank Allbritten Motors, Inc., 16 F.R.D. 109 (W.D. Mo. 1954); McCullough v. Walker Livestock, Inc., 220 F.Supp. 790 (W.D. Ark. 1963); United States v. West Willow Apartments, Inc., 245 F.Supp. 755 (E.D. Mich. 1965).

[17, 18] 10. The movants have not offered to restore the *status quo ante* the April 1st payout nor has there been any proof forthcoming that they are able to do so. An offer to restore the entire *status quo ante* is, the Court concludes, required in the circumstances of this case to meet the terms which the Court is of the opinion would be just for relief. F.R.C.P., Rule 60(b); Willard C. Beach Air Brush Co. v. General Motors Corp., 88 F.Supp. 849, at 852 (D.N.J. 1950), rev'd on other grounds, 184 F.2d 569 (3 Cir. 1950). The limited allegation of the present movants that they can restore what they alone received, if their motion is granted, is not sufficient in the opinion of this Court.

[19] 11. I further find as a matter of law that where a party accepts the benefits of a settlement or compromise of his case, and he knows, or in the exercise of due diligence, should have known all the facts concerning that settlement, as is the case here, he ratifies that settlement by the acceptance of those benefits, whether the settlement in the first instance was unauthorized by him or not, and he is thereafter estopped to attack the settlement and the judgment entered thereon. Those movants who cashed their checks thus ratified the settlement. White Bird v. Eagle-Picher Co., 258 F.Supp. 308 (N.D. Okl. 1966); Robb v. Vos, 155 U.S. 13, 15 S.Ct. 4, 39 L.Ed. 52 (1894); Maryland Casualty Co. v. Beebe, 54 F.2d 743, at 746 (10 Cir. 1931); Cissell v. Great A & P Tea Co., 37 F.Supp. 913 (W.D. Ky. 1941); Yarnall v. Yorkshire Worsted Mills, 370 Pa. 93, 87 A.2d 192, 30 A.L.R.2d 939 (1952); Yahola Sand & Gravel Co. v. Marx, 358 P.2d 366 (Okl. S.Ct. 1960); Patterson v. Southern Railway Co., 41 Ga. App. 94, 151 S.E. 818 (1930); Johnson v. Star Piano Co., 27 Ga. App. 425, 108 S.E. 811 (1921); Tudryck v. Mutch, 320 Mich. 99, 30 N.W.2d 518 (1948), cert. den. 334 U.S. 819, 68 S.Ct. 1083, 92 L.Ed. 1749; Foxworth v. Murchison National Bank, 136 S.C. 458, 134 S.E. 428 (1926); Condor Petroleum Co. v. Greene, 164 S.W.2d 713 (Tex. Ct. App. 1942).

[20, 21] 12. Further as to Mr. Eddie J. Byrd and the heirs of Mr. D. Oliver, it is also well settled that failure to protest a settlement within a reasonable time, where allegedly the settlement was entered by the attorney without authority, works a ratification of the settlement since it is a client's duty, having actual or constructive knowledge of the settlement and its terms, to express his disapproval within a reasonable time. The same considerations as

underlie the finding that the motion was not made within a reasonable time also render this failure to protest unreasonable as to time, as it was not until filing of this motion that they in any way challenged before this or any other court the settlement of the suit. As to the heirs of Mr. Oliver, they did not even take the steps recommended by the Court, as conveyed to them by Milledge & Horn, to put themselves in a legal position to accept their share of the funds. As to Mr. Byrd, also it appears that he is not entitled to share in the settlement in any respect as he did not come within the class of persons holding Firemen seniority. The assertions of Allen Milledge, Esquire, in his affidavit to this effect have gone unchallenged. The failure by these persons to challenge the settlement has resulted, as noted above, in the payout of nearly $300,000 prior to any challenge of any type being made. Under these circumstances, I hold that by their silence, with knowledge, whether it be characterized as actual or constructive, they ratified. *See* Hot Springs Coal Co. v. Miller, 107 F.2d 677 (10 Cir. 1939); Powell v. Penna. Railroad Co., 166 F.Supp 448 (E.D. Pa. 1958), rev'd on other grounds 267 F.2d 241 (3 Cir. 1959); Beirne v. Fitch Sanitarium, Inc., 167 F.Supp. 652, at 654 (S.D. N.Y. 1958); Yarnall v. Yorkshire Worsted Mills, *supra; cf.* Kincade v. Jeffery-De Witt Insulator Corp., 242 F.2d 328 (5 Cir. 1957).

[22] 13. In regard to Mr. Moses Meeks, who has not cashed his check, he was present at the hearing on March 11th and voiced absolutely no objection to any of the proceedings nor did he in any way attempt to call the attention of the Court to any protest that he might have. His silence worked ratification. Posko v. Climatic Control Corp., 198 Md. 578, 84 A.2d 906 (1951);

Rackham v. Rackham, 119 Utah 593, 230 P.2d 566 (Utah S.Ct. 1951); *cf.* Appeal of Simon, 255 F.2d 365 (3 Cir. 1958).

[23, 24] 14. This leaves only Mr. Walter J. Howard among the present movants. He has not cashed his check. Mr. Howard wrote the Court a letter which was read at the hearing on March 11th, and he also took the stand and voiced his objection to the amount that he was to receive under the settlement. Mr. Howard was also allowed to read into the record at that hearing a further letter of March 10th to his attorneys, Milledge & Horn, setting forth the grounds on which he individually would be willing to settle his claim and asserting that his case was "single action, not class action" and that the amount given him and the relief afforded him was not sufficient. Then, following a recess during which Mr. Howard conferred with his attorneys, the following colloquy, in the presence of Mr. Howard, took place between Mr. Milledge and the Court:

> *Mr. Milledge*: Mr. Crump and Mr. Howard both have asked me to advise the Court that neither of them desire to see the settlement set aside as to the other men that each of them feels that their situation is a special situation. Today and on other occasions, I have advised them and others, that in our opinion, this is a class action and that the Court has no alternative but to approve it for all or for none.
>
> *The Court*: And you are speaking as attorney of record for those two men?
>
> *Mr. Milledge*: Yes, but they still wish to advise the Court that they would prefer to have their situation as to each of them treated separately. They

ask the Court to be advised of that for the various reasons that they have expressed in the letters and * * *

The Court: Well, let me ask you this, Mr. Alexander, (Counsel for Defendant) and that will bring it to a head. Are you willing to settle as to 73 and leave open the claims of two?

Mr. Alexander: No, sir.

The Court: That's what I suspected. Well, there is only one thing for the Court to do under the circumstances, and that is to go ahead with the settlement as to all 75. Now, come up if you have any further objections, Mr. Howard or Mr. Crump, and let me hear from you. Who is the man stood up?

The Clerk: They are both sitting here at the table, Your Honor.

The Court: Excuse me, I didn't see them there. There was somebody in the audience that wanted to say something. Come up front and give your name.

Mr. Howard conveyed no further communications to the Court at all during the hearing on March 11th. At no time did he repudiate his representation by Milledge & Horn. At no time did he advise the Court that Milledge & Horn were not authorized to act on his behalf or to express his position although, of course, he was complaining of the inadequacy of the settlement as to him individually and was seeking to escape inclusion in the class. Further, Mr. Howard, although he had knowledge that payments would be made to all members of the class sharing in the settlement on April 1, 1970, took no further action prior to that time to bring to the attention of the

Court any matters now asserted in his motion made on his behalf, concerning the lack of authority of Milledge & Horn, his failure to understand the settlement, or any other matters. It does not appear to this Court that the mere statement by Mr. Howard in the hearing on March 11th that he was to some degree dissatisfied with the settlement as it applied to him, but without directly repudiating the authority of Milledge & Horn to speak as his attorneys of record and with no attempt being made to discharge them before the settlement was finally approved or the payments were made upon April 1st, is simply not a sufficient repudiation of either the authority of Milledge & Horn or the terms of the settlement. For a similar case so holding, see Poenisch v. Quarnstrom, 361 S.W.2d 367 (Tex. S.Ct. 1962). Nothing that is now alleged to support upsetting or overturning this judgment can in any way be characterized as "newly-discovered evidence" as far as Mr. Howard was concerned. He either knew all that he now complains of, or had constructive knowledge thereof. Evidence available in the files of this Court, to which Mr. Howard was specifically referred, cannot be changed into "newly-discovered" because he had not bothered to look at these files. Failure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law. I find that Mr. Howard, under these circumstances, is too late in attacking this judgment.

[25] 15. The movants now assert apparently that the settlement was too small and that this is a basis for relief from the judgment. I do not so find. First of all, no trial had been had nor even any answer filed. The complaint had not begun to be proved, although it was held to allege a claim. Proof might have failed entirely. Indeed,

steps had been taken to petition for certiorari in this case and that may have resulted in a change of things. Second, it does not appear likely that the punitive damages sought were recoverable as back pay is only to restore, not to penalize. United Industrial Workers, etc. v. Board of Trustees of Galveston Wharves, 400 F.2d 320, at 325 (5 Cir. 1968), cert. den. 395 U.S. 905, 89 S.Ct. 1747 23 L.Ed.2d 219; cf. Trinity Valley Iron & Steel Co. v. NLRB, 410 F.2d 1161, at 1167-1168 (5 Cir. 1969). Third, the Trustees Report of February 23, 1970, shows on the computer printout a total annual pre-strike firemen payroll of approximately $758,000. This times the seven-year period of 1963 through 1969 gives a maximum back pay liability of about $5,306,000. But there was a strike, as a result of which there were picket lines which these plaintiffs may have refused to cross in 1963 and 1964, or even, perhaps, later.[2] These could have reduced liability. See Raabe v. Florida East Coast Ry. Co., 259 F.Supp. 351 (M.D. Fla. 1966). Counsel for F.E.C. stated without challenge that there were interim earnings from F.E.C. and its trucking subsidiary alone of approximately $1,250,-000, to say nothing of what was earned elsewhere by other employees.[3] Also asserted was the consideration that F.E.C. had reduced freight traffic during the strike and also had almost no passenger service, all of which substantially reduced the number of positions available for firemen. Counsel also stated that about 20 members of the craft retired after the strike started, three never held fireman seniority, and three died during the strike. The

2. Employee Crump testified about picket line violence and never said he would have worked.

3. Employees Crump and Jorden both testified they had interim employment elsewhere.

question whether some class members were legitimately found to be physically disabled for work as firemen was still open as part of the case. Further, as noted above, only three of the more than 200 class members objected to the size of the settlement in any respect. The attorneys for both sides endorsed the settlement. I find in this record simply no substantial indication that the settlement was inadequate or that it was arrived at in any fashion other than in good-faith, arms-length negotiations between the adversaries.

16. None of the grounds urged by movants and discussed above are in my opinion the type of extraordinary grounds upon which a court can properly grant relief pursuant to Rule 60(b) (6) and I find relief is not justified under that part of Rule 60 for the reasons more fully set forth above concerning these items, whether they be viewed individually or cumulatively.

[26] 17. This Court concludes that any evidence now asserted by Movants as a basis for relief was all evidence which was actually known to Movants on or before March 11, 1970, or of which Movants had binding constructive knowledge through a notice from this Court and which by the exercise of due diligence, they could have discovered on or before March 11, 1970. I therefore conclude that no evidence upon which Movants now rely is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Any failure to produce such evidence on or before March 11, 1970, or to direct the Court's attention thereto was due solely by the Movants' lack of due diligence. I conclude that the Movants are not entitled to relief, in these circumstances, under Rule 60(b) (2).

18. Any finding of fact entered herein which may be construed in whole or in part as a conclusion of law, or any conclusion of law entered herein which may be construed in whole or in part as a finding of fact, shall be so deemed and treated as if properly set forth herein.

19. The motion for relief from judgment, filed herein on May 29, 1970, after hearing and argument thereon and the consideration of the entire record including briefs is hereby denied.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Jacksonville Division

No. 67-764-Civ.-J

NEHEMIAH MUNGIN, et al, *Plaintiffs,*
v.
FLORIDA EAST COAST RAILWAY COMPANY, INC., a Florida corporation, *Defendant.*

JUDGMENT OF THE TRIAL COURT

Filed March 11, 1970

(Title Omitted in Printing)

A suit having been brought by Nehemiah Mungin, and 74 other named individuals as original Plaintiffs, and the International Association of Railway Employees as Intervenor against Florida East Coast Railway Company, Defendant, in this Court; and the parties having appeared by their respective counsel; and

An offer having been made to settle and compromise this litigation; and

The Plaintiffs and Intervenor having accepted and requested the approval of this Court of said settlement and compromise; and

The Court having preliminarily approved said proposed settlement and compromise on December 30, 1969, as fair, adequate and proper in the circumstances, following full examination thereof and after having heard from all par-

ties in open Court on December 30, 1969, and having so entered an Order on said date directing a final hearing on said settlement and compromise and directing no less than twenty days notice to all members of the class prior to said hearing, the form of said notices being approved by this Court; and directing the payment by Defendant of certain sums pursuant to said settlement and compromise; and

Said notices having been duly served as ordered by this Court and all other requirements of the Order of this Court of December 30, 1969 having been complied with; and

A hearing having been duly held on said settlement and compromise on March 11, 1970; and the parties having appeared and having been heard by their respective counsel; and an opportunity to be heard thereon having been given to all members of the Plaintiff class herein; and all interested persons desiring to be heard having been heard; and the Court being fully advised, it is

ORDERED, ADJUDGED AND DECREED that said settlement and compromise is fair, adequate and reasonable and the same is hereby approved; and it is further

ORDERED, ADJUDGED AND DECREED that the amended complaint of Plaintiffs and the complaint of Intervenor in this action be and hereby are dismissed on the merits with prejudice and without cost and this judgment be and hereby is in full and final discharge of any and all claim or claims, or cause or causes of action, or part or parts thereof, against any and all Defendants, which are or might be asserted with respect to the matters alleged in the amended complaint of Plaintiffs and the complaint of Intervenor; and it is further

ORDERED, ADJUDGED AND DECREED that the settlement and compromise be consummated in accordance with the terms thereof; and it is further

ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction in this action for the purpose of receiving reports from the parties and from Allan Milledge and Richard L. Horn as Trustees of the F.E.C. Firemen's Trust Fund regarding the consummation of the settlement and compromise and for the purpose of fixing and allowing such proof as the Court shall deem proper fees to Milledge & Horn, attorneys for Plaintiffs and Intervenor, for their services rendered and disbursements incurred herein and providing for payment thereof out of the proceeds of the settlement.

DONE AND ORDERED at Jacksonville, Florida this 11th day of March, 1970.

CHARLES R. SCOTT
Judge, United States District Court

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

NEHEMIAH MUNGIN et al., *Appellants,*
v.
FLORIDA EAST COAST RAILWAY COMPANY, *Appellee.*

No. 26333

416 F.2d 1169
Sept. 22, 1969
Rehearing Denied Oct. 16, 1969

JOHN R. BROWN, Chief Judge:

Now rounding out a decade of industrial strife as the Nation's longest railroad strike against FEC, the history of which has been memorialized in a dozen or more Court opinions,[1] the tenth year of that turmoil once again

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1. For the following principal ones, showing post-1963 activity, we have for ease of reference substituted bracketed number-prefixes for citations, e.g., Op [1] p. __, Op [3] p. __.
Op [1]: Florida E.C. Ry. v. Brotherhood of R.R. Trainmen, 5 Cir., 1964, 336 F.2d 172, cert. denied, 1965, 379 U.S. 990, 85 S.Ct. 703, 13 L.Ed.2d 611.
Op [2]: Florida E.C. Ry. v. United States, 5 Cir., 1965, 348 F.2d 682, aff'd, Brotherhood of Ry. & S. S. Clerks v. Florida E.C. Ry., Op [3], 384 U.S. 238, 86 S.Ct. 1420, 16 L.Ed.2d 501.
Op [3]: Brotherhood of Ry. and S.S. Clerks v. Florida E.C. Ry., 384 U.S. 238, 86 S.Ct. 1420, 16 L.Ed.2d 501, aff'g Op [2].
Op [4]: Florida E.C. Ry. v. Brotherhood of Locomotive Engineers, 5 Cir., 1966, 362 F.2d 482.
Op [5]: Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 1969, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344.
Op [6]: Brotherhood of R.R. Trainmen v. Atlantic C.L. R.R., 5 Cir., 1966, 362 F.2d 649, aff'd by equally divided court, 1966, 385 U.S. 20, 87 S.Ct. 226, 17 L.Ed.2d 20.

puts Judges in the "locomotive cab." Op [1] p. 182. This time the task is easy—just getting the case back on the main line from a derail siding to which the Trial Judge's dismissal shunted it. There is nothing new here at all. Nominally the Appellants—individual workers — appear for the first time, but not really since their interests were directly presented both below and here in the Government's successful injunction suit against FEC. Ops [2], [3]. The claim is the old and judicially credited one that FEC in unilaterally credited one that FEC in unilaterally changing "rates of pay, rules, or working conditions" violated § 2 Seventh and § 6 of the Railway Labor Act.[2] The only

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It rounds out the 1959-1963 history to state that it all began on November 2, 1959. At that time FEC, along with about 200 other Class I Carriers in the United States, issued two notices of contemplated work changes pursuant to § 6 of the Railway Labor Act. These notices led to conferences, mediation, litigation (see Brotherhood of Locomotive Engineers v. Baltimore & O. R.R., 1963, 372 U.S. 284, 83 S.Ct. 691, 9 L.Ed.2d 759), and even the now famed statute, Public Law 88-108, Act of August 28, 1963, 77 Stat. 132, which continues to generate nationwide litigation in the controversy precipitated by Rudolph Diesel's revolutionizing (but not exterminating) the occupation of railroad fireman and the carriers' efforts to complete the task he began by eliminating firemen from diesel engines. See Brotherhood of Locomotive Firemen & Enginemen v. Central of Ga. Ry. (*Merits*), 5 Cir., 1969, 411 F.2d 320; Brotherhood of Locomotive Firemen and Enginemen v. United States (*Contempt*), 5 Cir., 1969, 411 F.2d 312. See also the cases cited in footnote 1 of Brotherhood of Locomotive Firemen & Enginemen v. Central of Ga. Ry., *supra*.

2. Section 2, Seventh states:

§ 152. General Duties—Duty of carriers and employees to settle disputes

* * *

Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

45 U.S.C.A. § 152, Seventh.

thing new is that it is the individual members of the Union,[3] and not IARE as an entity or the national sovereign, that pursue FEC. Although this newness is so slight it is barely a ripple, much less a wrinkle, *cf.* Mike Hooks, Inc. v. Pena, 5 Cir., 1963, 313 F.2d 696, 1963 A.M.C. 355, apparently it threw the switch that derailed the case into dismissal. We say apparently, for once again dismissal is by an unrevealing skeleton of an order[4] unillumined by any stated reasons except as they might be deciphered from the law's hieroglyphics—a few cited precedents. But vague as it is, it is plain enough to reveal its own error and we reverse.

Section 6 states:

> § 156. Procedure in changing rates of pay, rules, and working conditions
>
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C.A. § 156.

3. International Association of Railway Employees (IARE) is the representative of the craft of Negro firemen.

4. "1. The motion of [FEC] to dismiss the complaint is granted because this Court lacks jurisdiction of the subject matter of this suit. See Stack v. New York Central Railroad Company, 258 F.2d 739 (2 Cir. 1958); Smithey v. St. Louis Southwestern Railway Company, 237 F.2d 637 (8 Cir. 1956); Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 661, 73 S.Ct. 906, 910, 97 L.Ed. 1325."

Capsulating the background aids in considering the claims made in the complaint.[5] In doing so we draw freely on the Complaint, the Findings of Fact and Conclusions of Law, and the Injunctive Decree in the Government's suit against FEC. Ops [2], [3]. The activities began on January 23, 1963 when 11 non-operating unions[7] went on strike against FEC. The operating unions did not strike. They did, however, honor the picket lines. FEC was forced to shut down by the strike, but, only stunned lightly, it resumed operations on February 3 by utilizing supervisory personnel and some replacement workers. Since February 3, 1963 the strike has continued but FEC has continued its operations at almost full steam using a work force less than half the size of its pre-strike level. FF 7, 8.

Now enters the Railway Labor Act, for on July 31,[8] and September 24, 1963[9] FEC issued § 6 notices to 17

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5. It had more than enough specifically to pass muster under Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Barber v. M/V "Blue Cat", 5 Cir., 1967, 372 F.2d 626, 1969 A.M.C. 211; and Pred v. Board of Public Instruction, 5 Cir., 1969, 415 F.2d 851, 852 n. 1, which brings the score up to date.

6. See FRAP Rules 30(a), (b), 10(a), (e), which permit us to consider as before us any matter of record in the Trial Court. Obviously it is not "outside" information since there is a positive identity of subject matter and practical identity of parties—FEC on one side, the employees, vicariously represented by unions or sovereign, on the other. *Cf:* Restatement, Judgments § 85 (1942). See also §§ 83, 99. The Sovereign was protecting the public interest as well as the rights of the affected employees and any question of the Government's standing to protect these interests was dispelled in Ops [2] and [3].

We shall refer to the Findings of Fact as "FF" and the Conclusions of Law as "CL".

7. Listed FF 3 n. 1.

8. FF 17 n. 3.

9. FF 9 n. 2.

craft unions.[10] In between, on September 1, FEC, without filing any § 6 notice, issued what it called "Conditions of Employment," which merely codified the rules that strike-breaking employees had been working under since February 3. By these "Conditions" FEC unilaterally adopted a uniform set rates of pay, rules, and working conditions, which were substantially different from the existing collective bargaining agreements.[11]

This was of extreme importance, for the September 24 § 6 notice[12] proposed to amend the collection bargaining agreements then in force and replace them with a new "Uniform Working Agreement," which was substantially the same as the September 1 "Conditions of Employment." The proposals were put into effect by FEC without compliance with the Railway Labor Act's mediation requirements.[13]

This brings us to the specific problem of IARE and its members as related by the complaint (see note 5, *supra*).

IARE is a party to a collective bargaining agreement with FEC which was in force on January 23, 1963. At the

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10. Specifically included was IARE, FF 17 n. 3, 9 n. 2.

11. Each employee reporting for work after September 1, 1963 was required to waive his rights under the existing collective bargaining agreement for his craft or class and agree individually to accept and abide by these new "Conditions of Employment." FF 6.

12. The July 1, § 6 notice proposed to cancel and abolish the union shop provisions of its collective bargaining agreements with these unions.

13. About the only difference between the processing of IARE's notice and that of the other unions is that IARE, continuing negotiations beyond October 23, 1963, excluded itself from the Mediation Board's case No. A-7055, but after negotiations terminated on December 18, 1963, its case became A-7093. Each case was still pending when Judge Simpson issued the injunction of October 30, 1964. FF 11, 10, 13, 18.

time of commencement of the strike FEC notified IARE that the position of fireman was abolished. Not long after operations were resumed on February 3, 1963, IARE was notified that its members were furloughed until further notice. Shortly thereafter firemen's jobs were advertised by FEC, but when IARE members submitted their bids to work, they were again told that the jobs had been abolished. A similar process of job advertisement, bid, and abolition occurred in November 1963.

In the meantime an operating Brotherhood[14] and the Government[15] had obtained injunctive orders against FEC. The Government injunction was sweeping in terms and extended to all crafts identified in the Court's footnotes 1, 2, and 3 (see notes 7, 8, 9 *supra*) including IARE. FEC was restrained from continuing in effect or implementing the changes announced in the September 24 and July 31 notices, from taking any action under the September 1 "Conditions of Employment," from making other changes in rates of pay, rules, or working conditions covered by existing collective bargaining agreements except in accordance with the procedures of the RLA. FEC was ordered to revoke all action taken under the notices and statement, to reinstate the provisions of the collective bargaining agreements, and to bargain in good faith.[16]

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14. The Brotherhood injunction was entered on March 7, 1964 and affirmed with modification on August 18, 1964. Op [1].

15. The Government injunction was entered on October 30, 1964 and affirmed with modification by us on July 21, 1965, Op [2], and by the Supreme Court May 23, 1966, Op [3].

16. "ORDERED, ADJUDGED AND DECREED:

1. That [FEC is] enjoined and restrained, until further Order of this Court, from:

(a) in any manner continuing in effect or implementing in any respect the changes in rates of pay, rules or working conditions

But despite this Government injunction, the Complaint went on, FEC presumably trying to show compliance with

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announced in FEC's notices of September 24, 1963, and July 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action under any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's 'Conditions of Employment' promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike.

2. The Defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further Order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the changes in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its 'Conditions of Employment' of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefore by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees."

it, advertised some firemen's jobs and accepted some bids. By the institution of discriminatory physical examinations, however, not only all firemen but virtually all returning operating employees were disqualified from return.[17] But FEC had other weapons in its arsenal. On September 2, 1965, on the eve of Judge Simpson's finding FEC in contempt for this discriminatory examination gambit,[18] FEC obtained and executed an agreement with the IARE president. The president (who under the constitution of that organization did not have authority to sign such an agreement) purported that to agree that the firemen had in fact been physically unfit and purported to settle outstanding disputes with the IARE. Not surprisingly that agreement was set aside as null and void in its entirety on August 8, 1967.[19] But that helped little for since the execution of the 1965 illegal agreement, the few firemen allowed to return to work have been forced immediately to take a promotion to engineer,[20] and no one has been permitted to work as a fireman since that time.

The complaint winds up with wholly unnecessary but now time and time again judicially credited, charges[21] in

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17. Other operating craft unions thereupon brought contempt proceedings in the main injunctive lawsuit against FEC.

18. Brotherhood of Locomotive Engineers v. Florida E.C. Ry., M.D. Fla., 1965, No. 64-239-Civ-J [Order on Rule to Show Cause, Sept. 24, 1965].

19. Harrison v. Florida E.C. Ry., M.D. Fla., 1967, No. 65-366-Civ-J.

20. Such promotion was not provided for in the FEC-IARE Agreement and had never previously been permitted.

21. See Op [1], Op [2], Op [3]. See also Conclusions of Law (note 6 *supra*) declaring the dispute to be a "major" one (CL 3); unilateral action under the July 31, September 24, 1963 notices violated §§ 2, Seventh, 5, First, and 6 (CL 5); initiation of September

railroad legalese, that FEC by this course of conduct has violated § 2, Seventh and §6 of the Railway Labor Act and has abrogated the collective bargaining agreement in effect between FEC and IARE.[22]

Jurisdiction was formally claimed to exist under 28 U.S.C.A. § 1331[23] as a federal question with more than $10,000 in dispute, and under § 1337 as a case arising under a commerce law.[24]

Although, for the reasons we state, the question of jurisdiction is to us very simple, we expand the factual treatment and our reasons because Judge Scott, who has given such careful superintendence to his railroad duties, Op [1] p. 182, Op [2] p. 686, as successor to Judge Simpson[25] apparently was overly influenced by two factors troubling to him. The first was that the suit was by

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1, 1963 working conditions violated §§ 2, First, Second, Seventh, § 5, First, and § 6 (CL 6); exaction of individual agreements for pay, etc. different from bargaining agreements violated §§ 2, First, Second, Seventh, § 5, First, and § 6 (CL 7).

22. "FEC's past and continuing violation of the Railway Labor Act by completely abrogating the IARE-FEC agreement has totally frustrated the purposes and operations of said Act, and has resulted in direct and proximate monetary loss" to members of IARE.

23. "§ 1331. Federal question; amount in controversy; costs
(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."
28 U.S.C.A. § 1331(a).

24. "§ 1337. Commerce and anti-trust regulations
The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."
28 U.S.C.A. § 1337.

25. Judge Simpson joined the Fifth Circuit on November 22, 1966.

employees, not by a union, and the second was that the relief formally prayed for was a money award. As a part of the second, there was the emphasis, repeated several times in the complaint,[26] but which our treatment of the Government's suit proves to be demonstrably unfounded, that IARE and its members were not the beneficiaries of any injunction, so that a money award, not contempt, would be the only effective sanction. The Judge was, of course, responding to like advocative contentions made by FEC which took an even more technical turn. Thus, FEC's brief emphasizes that in the allegations[27] there is

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26. The Complaint states:

"In 1964, the FEC operating and non-operating craft unions, (with the exception of IARE) and the United States Government brought lawsuits against FEC to prevent FEC from further operation in violation of the Railway Labor Act and collective bargaining agreements.

"Injunctive orders were issued by the United States District Court, Middle District of Florida * * *.

* * * * * * * *

"Since IARE was not among the craft unions which had obtained such injunctive orders, FEC continued its operation without locomotive firemen and continued its unlawful failure and refusal to allow plaintiff to work as a locomotive fireman.

* * * * * * * *

"In December, 1964, FEC advertised some firemen's jobs. Certain locomotive firemen's bids were accepted and they were ordered to take physical examinations. In virtually every instance, by the application of FEC's discriminatory standard, said locomotive firemen were found unfit to perform locomotive firemen duties. Since IARE had no lawsuit or injunctive order obtained on their behalf, no contempt action was brought."

27. They single out:

(Paragraph 25)

"FEC * * * had engaged * * * in the * * * abrogation of the collective bargaining agreement in effect between IARE and FEC * * *."

(Paragraph 26).

"As a * * * result of said * * * abrogation of said collective bargaining agreement, Plaintiff has suffered the deprivation of

an "absence of any reference to 'back-pay' or prayer for maintenance of the 'status quo' [and] * * * the allegations * * * show that the [IARE members] were seeking to recover damages for * * * breach of the contract and the Railway Labor Act."[28]

There are a number of things wrong with this approach. First, keeping in mind the *Conley-Gibson* concept (note 5, *supra*), which permits dismissal on pleadings only when to a certainty no facts can be brought forward on which to base relief, the one thing that is certain from Ops [1], [2], and [3] and the Findings of Fact and Conclusions of Law approved by Ops [2] and [3] is that all of this conduct, of which IARE was but one of several targets or subjects of FEC unilateral action, was in flagrant violation of the Railway Labor Act. Thus, whether the members of IARE seek injunctive relief or not, they can establish this patent violation which resulted in not just a breach of contract but a complete abrogation of the collective bargaining agreement. By Ops [1], [2], and [3] it is clear that for such conduct the courts may grant suitable relief. The second thing wrong with FEC's attack is that once the question of relief is approached, several subsidiary factors become significant. At the outset, subject matter

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* * * his lawful rights, including his right to work as a locomotive fireman * * * under * * * said agreement."
(Paragraph 27).

"FEC's past and continuing violation of the Railroad Labor Act by * * * abrogating the IARE-FEC agreement * * * has resulted in direct and proximate monetary loss to Plaintiff."
(Paragraph 28)

"FEC's * * * violation of the Railroad Labor Act * * * and its continuing abrogation of the IARE-FEC collective bargaining agreement has been and is * * * calculated to deprive Plaintiff of his lawful rights."

28. FEC brief at 7, 8.

jurisdiction seldom depends on the precise relief sought. The caboose does not run the train. Next, that brings into play F.R.Civ.P. 54(c)[29] which, once an answer or motion is filed, makes relief dependent not on the prayer but on what the facts show to be appropriate. Consequently it is out of keeping both with the spirit of *Conley-Gibson* (see note 5, *supra*) and Rule 54(c) to permit at this late stage a hypercritical reading of the complaint and to hold, as would FEC (and perhaps the Trial Judge), that a demand for a money award would not encompass one for the payment of the same sort of dollars under the remedial category of "backpay". Indeed, these principles still leave open to the Trial Court on remand whatever other or further relief is appropriate, including with suitable protections, the equivalent of reinstatement, backpay, injunctions and the like.

Of course these basic errors in procedural approach led to like substantive errors. This was not a relatively simple case of the type reflected in the cases cited by the Trial Court (see note 4, *supra*) where relief is asked by reason of a discharge which might constitute a breach of the contract and the Railway Labor Act and there is a re-

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29. "(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."
F.R. Civ. P. 54(c).

We have given full voice to this rule. See Equity Capital Co. v. Sponder, 5 Cir., 1969, 414 F.2d 317, 319 n. 1; Molnar v. Gulfcoast Transit Co., 5 Cir., 1967, 371 F.2d 639; Burton v. State Farm Mut. Auto. Ins. Co., 5 Cir., 1964, 335 F.2d 317; South Falls Corp. v. Rochelle, 5 Cir., 1964, 329 F.2d 611; Smoot v. State Farm Mut. Auto. Ins. Co., 5 Cir., 1962, 299 F.2d 525.

quirement to exhaust grievance, or Railway Board of Adjustment, remedies. Nor was it one making a *Hettenbaugh*[30] attack.

Rather, this case, as those in Ops [1], [2], [3], and [4], is one in which there was a complete abrogation of the collective bargaining agreement and an unlawful substitution of new working conditions including here the abolition of a craft—firemen. In words which discussed many of these very actions taken by FEC, and which parallel those taken toward IARE, we have already declared that this is a major dispute and that Federal Courts are open to grant appropriate relief.[31]

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30. Hettenbaugh v. Airline Pilots Ass'n, 5 Cir., 1951, 189 F.2d 319. Considering all that has happened in this dynamic field since 1951 we need not consider just how much is left to that holding, but it is plain that the opinions emphasis, that it "is only when collective bargaining agreements are unlawfully entered into, or when the agreements themselves are unlawful in terms or effect, that federal courts may act," is way too narrow a description of the situations in which Railway Labor Act violations loosen federal jurisdiction.

31. Op [1] states:

"First, we think that this is clearly a so-called 'major dispute' within the meaning of the decisions of the Supreme Court and this Court. (citations omitted). This is not a case * * * involving a dispute as to whether the agreement authorizes action taken by the Carrier. Neither is it a case involving a dispute over the meaning of the terms relating to rates of pay, hours, and working conditions. Rather, this is a case in which a Carrier has unilaterally instituted wholesale changes in these terms, changes which, in negotiations presently going on with respect to the September 25 notice, it seeks to establish permanently. The bulk of the changes were instituted on February 3, 1963, with no pretense at compliance with the Act. * * * Employees hired after September 1, 1963, were made to sign the 'Conditions of Employment' which formally reduced to writing the changes of February 3, 1963. Again, this was done with no pretense of compliance with the Act. Finally on September 25, 1963, the FEC served a § 6 Notice with respect to those changes. Whether the strike conditions do justify the changes in whole or in part

This IARE case is no less a major dispute or one arising under 28 U.S.C.A. § 1337 (see note 24, *supra*) simply because the prayer is cast initially in terms of a money award.

. If—and the if is a little one—there was some doubt on subject jurisdiction, it was all dispelled by International Ass'n of Machinists v. Central Airlines, Inc., 1963, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67, which reversed this Court, 5 Cir., 1961, 295 F.2d 209 in its jurisdictional holding that a suit to enforce the award of a Systems Board of Adjustment was not within the federal jurisdiction since such "suit is nothing more than a state-created action to construe a contract," 295 F.2d 209, 220; 372 U.S. 682, 684, 83 S.Ct. 956, 958, 10 L.Ed.2d 67, 70. After analyzing the necessity for national uniformity in the administration of the Railway Labor Act, the Supreme Court, holding that all subsidiary questions were for determination by federal law or federal principles, rejected the restrictive approach of Gully v. First National Bank and similar cases on the "arising under" standard of §§ 1331 and 1337:

> "The contract of the parties here was executed under § 204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the

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is admittedly a difficult question, but neither the presence of the question nor its difficulty changes the character of the dispute from 'major' to 'minor.'"

Op [1] p. 178-79.

> contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires it compliance.

In the circumstances we have here, we are not dealing with a suit involving an aspect of federal law which is only collateral or remote or a case where state and federal laws are so blended as to present a serious question of the scope of the arising-under provision of § 1331 or § 1337. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577; Gully v. First Nat. Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194; Romero v. International Term. Co., 358 U.S. 354, 393, n. 4, 79 S.Ct. 468, 491, 3 L.Ed.2d 368, 394 (dissenting and concurring opinion). In our view the complaint in this case, for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 USC § 1331 if the jurisdictional amount is satisfied and in any case under § 1337. Romero v. International Term. Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368; Montana-Dakota Utilities Co. v. Northwestern P. S. Co., 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 [917]; American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 [989]."

Equally decisive, both on the question of jurisdiction and on the question of remedy, are the *Galveston Wharves* cases of this Court.[32] Because the effect of the leasing of

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32. United Indus. Workers v. Board of Trustees of Galveston Wharves, 5 Cir., 1965, 351 F.2d 183 (Galveston Wharves I); United Indus. Workers v. Board of Trustees of Galveston Wharves, 5 Cir.,

the elevator was to terminate the collective bargaining contract with the Union, we held in *Galveston Wharves I* that this result without prior compliance with the negotiation-mediation provisions of the Act was illegal and subject to Federal Court intervention. Although an injunction against the lease itself was sought, this was not granted. We remanded the case for the imposition of "some suitable relief and sanction." 351 F.2d at 191-192. Showing that the molding of relief was no mechanical proposition, *Galveston Wharves II* held that the order to bargain was insufficient. 368 F.2d at 413. In *Galveston Wharves III* we reversed the Trial Court's third holding that, in effect, the back wages portion of the relief was a pure contract claim which called for Railway Adjustment Board processing (much as did the District Court here, see note 4, *supra*). We held that the Federal Court "has authority to require payment of backpay as a sanction for the Carrier's having violated Section 6" of the Act. 400 F.2d at 323. We pointed out that "the purpose of the relevant sections of the Act is maintenance of the status quo pending conference. The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the Carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act." 400 F.2d at 325. And as though written for IARE-FEC we said, "The Carrier's error stems from its premise that '[i]f the members of this

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1966, 368 F.2d 412 (Galveston Wharves II); United Indus. Workers v. Board of Trustees of Galveston Wharves, 5 Cir., 1968, 400 F.2d 320, cert. denied, 1969, 395 U.S. 905, 89 S.Ct. 1747, 23 L.Ed.2d 219 (Galveston Wharves III).

Union are entitled to backpay, it is because they were wrongfully discharged.' " 400 F.2d at 326. Rejecting the minor dispute contention, we went on in words which match this case perfectly. "But the employees here do *not* claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant." 400 F.2d at 327.

[1] A suit for money award encompasses backpay. It encompasses also, if appropriate, reinstatement and reconstruction, so far as practicable, of the status quo.[33]

So much would surely have been mandated had this suit been brought by IARE. Is it any different now that it was brought by the members?

[2, 3] We start with the proposition that the Railway Labor Act calls for *collective* action. Once it has been taken, no member of the craft has any right or power to alter the specified working conditions. Neither the employee nor a group of employees may alter or waive prescribed provisions until the agreement is changed by processes under the Act. Op. [1] p. 180 and n. 24, citing Order of R. R. Telegraphers v. Railway Express Agency, 1944, 321 U.S. 342, 64 S.Ct. 582, 88 L.Ed. 788; Op. [3]. This carries out the statutory scheme that bargaining is by the majority representative and once done it is for all and binds all. Indeed it must be done fairly for all craft members whether members of the Union or not. Steele

33. The wisdom, if not necessity, of our holding is demonstrated by the fact that if full relief were not accorded, FEC would effectually secure a departure from pre-February 3, 1963-September 24, 1963 conditions without ever having sought or obtained the right to interim departure. See Op [2] p. 684.

v. Louisville & N. R.R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173.

This record bears out why, in effectuating congressional objectives, the law must accord to employees the right, if not the duty, of asserting on behalf of craft members their rights under the Act where from disloyalty, corruption, or other influences the Union has failed in its duty of faithful representation.[34] (See note 19 and related text, *supra*).

Consequently, with a suit of multiple, but individual, parties comprising a substantial number of the members of the craft, we hold that it was a claim both for individual relief and, even more so, a claim on behalf of the entire craft whether represented or not.

The case must therefore go back for further proceedings including the granting of whatever relief is appropriate to vindicate the rights under the Railway Labor Act.

Reversed and remanded.

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34. Undoubtedly where there is vigorous controversy in the litigation between the Union and members seeking to intervene, etc., the Court must determine to what extent or upon what terms it will deal with such dual voices. *Cf.* Acuff v. United Papermakers and Paperworkers, 5 Cir., 1968, 404 F.2d 169, cert. denied, 394 U.S. 987, 89 S.Ct. 1466, 22 L.Ed.2d 762.

APPENDIX D

FIFTH CIRCUIT OPINION OF APRIL 19, 1971

No. 29878

NEHEMIAH MUNGIN, ET AL.,
Plaintiffs-Appellees,
WALTER J. HOWARD, ET AL.,
Plaintiffs-Appellants,
versus
FLORIDA EAST COAST RAILWAY COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(April 19, 1971)

Before WISDOM, BELL and AINSWORTH, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1. See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 67-764-Civ-J

NEHEMIAH MUNGIN, et al,

Plaintiffs,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, INC., a Florida corporation,

Defendant.

NOTICE OF FINAL HEARING

TO: All employees or former employees or their representatives of the Florida East Coast Railway Company who held seniority in the craft or class of Locomotive Firemen on January 23, 1963, or thereafter to date who were available, qualified, entitled and willing to perform work as a Locomotive Fireman for FEC since January 23, 1963, and would have performed such work but for the allegedly illegal conduct of FEC.

In pursuance of an order of Honorable Charles R. Scott, a Judge of the United States District Court, Middle District of Florida, notice is hereby given under Rule 23, Federal Rules of Civil Procedure that, in the matter en-

titled 'United States District Court, Middle District of Florida, Nehemiah Mungin, et al, plaintiffs against Florida East Coast Railway Company, a Florida corporation, defendant (No. 67-764-Civ-J),' an action brought pursuant to the Railway Labor Act, an application is pending for approval of a compromise of that action whereby defendant FEC shall pay into the "F.E.C. Firemen's Trust Fund" sums in full settlement of any and all alleged liability. A statement from the Trustees showing the amount due you individually under the terms of the settlement and of the "F.E.C. Firemen's Trust Fund" is attached hereto.

A hearing has been held on the preliminary advisability of said settlement and the Court having heard from representatives of all the parties has preliminarily approved the settlement as fair, adequate and proper in the circumstances. Pursuant to this preliminary approval, FEC has paid into the "F.E.C. Firemen's Trust Fund" the sum provided for in the Stipulation of Settlement.

A hearing on the final advisability of the settlement of this action will be held before the Honorable Charles R. Scott, at the United States Courthouse, at Jacksonville, Florida, on the 11th day of March, 1970, at 10:00 o'clock A.M., at which time all interested parties may be heard.

The original complaint in this action, a motion to amend that complaint, a motion for intervention, a motion to allow maintenance as a class action, orders granting said motions, and a full copy of the Stipulation of Settlement and amendment thereto, including a copy of the Trust Instrument establishing the "F.E.C. Firemen's Trust Fund" and amendment thereto, and a copy of an Agreement between FEC and IARE concerning abolition of the craft of Locomotive Firemen and eligibility for promotion

of employees holding seniority as Locomotive Firemen as of the effective date of the agreement to operating positions with FEC are on file in the office of the Clerk of the United States District Court for the Middle District of Florida in Jacksonville, Florida, and may be examined by you there.

Dated: February 4, 1970

MILLEDGE AND HORN,
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By ALLAN MILLEDGE

SUPREME COURT, U. S.

in the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-93

WALTER J. HOWARD, LEANDRUS JORDEN, ARTHUR L. DAVIS, WILLIE E. JORDEN, GORDON ROGERS, MOSES MEEKS, JAMES L. SIMS AND H. A. CRUMP,

Petitioners,

vs.

FLORIDA EAST COAST RAILWAY CO., INC. AND NEHEMIAH MUNGIN, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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OPINIONS BELOW

The Fifth Circuit Court of Appeals, per Circuit Judges Wisdom, Ainsworth and Bell entered a *Per Curiam* Order of Affirmance pursuant to Rule 21 of the Rules of that Court.[1] Appendix D to Petition. The Final Judgment appealed from dated March 11, 1970 appears as Appendix B to the Petition. The Findings of Fact and Conclusions of Law of the District Court dated August 11, 1970, denying Petitioner's Motion for Relief from Judgment under Rule 60(b) from which no notice of appeal was filed is reported at 318 F.Supp. 720 (M.D. Fla. 1970) and appears as Appendix A to the Petition. The Fifth Circuit Court of Appeals' earlier opinion in this case is reported at 416 F.2d 1169 (5th Cir. 1969), and appears as Appendix C to the Petition.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the correctness of a per curiam affirmance by the Court of Appeals, of the Final Judgment of the District Court approving the compromise and settlement of a class action, should be reviewed by this Court in which:

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[1]Rule 21 provides:

Rule 21 Affirmance Without Opinion

When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous * * * (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

A) Maintenance of the suit as a class action was required by the earlier opinion of the Court of Appeals;

B) The formal notice to the class fully complied with Rule 23(e), and in addition, the class members, including petitioners, were fully and properly advised by their counsel as to the basis and implications of the settlement in numerous meetings, conferences and communications prior to the final hearing;

C) No class member prior to Final Judgment and the actual receipt of benefits by all entitled class members, ever communicated to counsel or to the Court a position in opposition to the settlement which might have the effect of blocking the settlement;

D) The intervening collective bargaining representative of the class had no hostile, conflicting or adverse interest in the litigation from that of its members;

E) A portion of the settlement funds amounting to $300,000.00 has been accepted and retained by all class members, including petitioners, pursuant to the final judgment, (two petitioners are "holding" their checks);

F) No notice of appeal was filed by petitioners from the later District Court Order denying their "Motion for Relief from Judgment".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 19, 1971. No petition for rehearing was filed by petitioners.

STATEMENT

A. Preliminary Statement

The Petition has been filed to review a Per Curiam Order of Affirmance (A. D1)[2] issued by the Fifth Circuit Court of Appeals per Circuit Judges Wisdom, Ainsworth and Bell under Rule 21[3] of the Rules of that Court. Such an Order amounts to a certification by the Court of Appeals that findings of fact by the District Court are not "clearly erroneous", that "no error of law appears", *and "that an opinion would have no precedential value."* The Fifth Circuit Court of Appeals does not cavalierly make such determinations, as its opinion fully explaining the reasons for the usage of the rule makes plain. *NLRB v. Amalgamated Clothing Workers*, 430 F.2d 966, 972 (5th Cir. 1970).

> "By Rule 21 the Court * * * is specifically commanded to make the conjunctive judicial determination that an opinion would have no precedential value. Having to make unanimously that explicit decisive determination, and implicitly,

[2]The symbol "A." followed by the letter and numeral refers to the page of the decisions of the Court of Appeals and District Court as reproduced in the petition. The symbol "R." refers to the appendix in the Court of Appeals.

[3]See footnote 1, *supra*.

> the further one that circumstances or factors, other than precedential value, do not make an opinion essential or appropriate, the Court, by the adoption of the Rule, affirms that it must be carefully and selectively employed. 430 F.2d at 972.

On the basis of such a certification by the Court of Appeals issued after exhaustive briefing and oral argument, petitioners seek to persuade this Court that plenary Supreme Court review is appropriate by using the same kind of innuendo and baseless assertions which they have utilized to this point in the case to no avail. *Petitioners make not a single reference to the record in their entire Petition.*

Respondents, Nehemiah Mungin, et al., are more than one hundred members of the class of locomotive firemen who have, as have petitioners, already received substantial benefits from and desire to maintain the compromise and settlement reached with the FEC, approved and reapproved by the District Court and the Court of Appeals. Given the type of allegations contained in the Petition counsel for respondents deem it appropriate to reply in some detail to the charges and "rumors of irregularities", (Pet., p. 22) which are the asserted bases of the Petition.

B. Background of the Case

The background of the case is related in the Court of Appeal's initial opinion, reversing the District Court's dismissal of the complaint, *Mungin v. Florida E. C. Ry. Co.*,

416 F.2d 1169 (5th Cir. 1969) (A. C 1-18). It should be noted, however, that with the exception of the factual findings which appear of record in the Court orders and opinions referred to therein, the remaining allegations (including those relating to FEC's conduct vis-a-vis its locomotive firemen and the response of the individual locomotive firemen) are simply that, allegations in the complaint. The provability of these allegations particularly with reference to individual conduct was never, of course, put to the test of proof, nor were any defenses which FEC might have interposed to eliminate or minimize its liability formally plead or tested.

This suit was filed by seventy-five locomotive firemen represented by the undersigned counsel. This group of firemen, which comprised the vast majority of persons actively employed by FEC as locomotive firemen in January 1963, included the petitioners as well as the respondents.

At the time the suit was initially filed (November, 1967) and dismissed by the District Court (April, 1968), *United Industrial Workers v. Galveston Wharves*, 400 F.2d 320, (5th Cir. August 8, 1968), *cert. den.* 395 U.S. 905 (1969), had not yet been decided. The basis of dismissal in the District Court was lack of jurisdiction based upon the alleged primary jurisdiction of the National Railroad Adjustment Board for any monetary claim. Since at the time the suit was filed and dismissed initially, no court had ever awarded monetary damages for a breach of the Railway Labor Act, and indeed the law in the Fifth Circuit was to the contrary, *Louisville & Nashville R. Co. v. Brown*, 252 F.2d 149 (5th Cir. 1958); *cert. den.* 356 U.S. 949 (1959), the issue of the plaintiffs standing to sue did not

arise until the jurisdiction of the District Court to award back pay became clear with the *Galveston Wharves* decision.

In the initial *Mungin* opinion the Court of Appeals dealt specifically with the problem of the standing of individual employees to proceed against the FEC. In the final conclusion to this opinion, the Court stated:

> "Consequently, with a suit of multiple, but individual, parties comprising a substantial number of the members of the craft, we hold that it was a claim for individual relief and, even more so, a claim on behalf of the entire craft whether represented or not." 416 F.2d at 1178. (A. C18).

By this language it was apparent that in conferring standing to sue upon the group of individuals who comprised the plaintiffs, the Court was imposing upon the group the duty to represent "the entire craft whether represented or not." *Id.* Thus while the case had come to the Court of Appeals as a suit on behalf of seventy-five FEC firemen, it left the Court of Appeals as a suit which necessarily encompassed the interests of the approximately two hundred persons who held seniority as locomotive firemen with FEC.

In the opinion of counsel the only appropriate manner to carry out the mandate of the Court and to maintain "a claim on behalf of the entire craft whether represented or not", *Id,* was by the procedural device of a class suit. In examining the provisions of Rule 23, Fed. R. Civ. P., it was and is apparent that the present case fitted precisely within the categories of a "True" class suit pursuant to Rules 23(a), 23(b) (1) (A) and (B) and 23(b) (2).

In this case an excellent compromise class action settlement, fair, adequate and reasonable for all concerned in light of all of the attendant circumstances, is under attack by a small group of individuals, who have waited until after they and all other entitled members of the class had received cash in hand pursuant to the judgment and settlement before asserting any objection to the entire settlement.[4]

The attack sought to be raised in the Petition is focused not upon the settlement itself however, but upon alleged conflicts of interest and improper representation by counsel for the locomotive firemen, together with the procedures followed in the District Court. These attacks are wholly without merit. There was no conflict of interest, nor any improper representation by counsel, and the procedures followed in the settlement of this necessarily class action were fair and reasonable for all.

It is hardly to be expected in the resolution of a complex and difficult labor matter involving two of the most bitter and complex situations recently affecting the railroad industry, the elimination of firemen and the protracted FEC disputes, that every individual affected would be wholly satisfied with the outcome.

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[4]All of the petitioners were among the members of the class who received monetary benefits from the settlement. The petition cites (Pet. p. 20) the example of the petitioner who received the lowest amount, $5,287.00, based upon his having the lowest pre-strike earnings. The petitioner who received the highest amount was Moses Meeks at $12,058.10, based upon his having the highest pre-strike earnings. The average share received by the eight petitioners was $8,400.00. (R. 67-75).

C. The Compromise Proposal

The settlement proposal reflected a careful appraisal of the various factors affecting the possible amount of recovery, if any, *e.g.*, the fact that the FEC dispute was a strike and as to each individual an open question was if and when the individual would have refused to honor the picket lines of striking employees and returned to work for the carrier, *Raabe v. Florida E. C. Ry. Co.*, 259 F.Supp. 351 M.D. Fla. 1966 (R. 274). Other factors were: the physical condition of the men, many of whom actually had disabilities and/or were advanced in years, actually 20 of the class had retired and several more had died since 1963; the outside earnings of the men, virtually all of whom had obtained substitute employment, and over one-third of whom had returned to railroad employment with the FEC (R. 226; 273-4); the necessity, if recovery had been cast specifically as "time lost", for the repayment of previously received railroad unemployment benefits, 45 U.S.C. §352(f); the elimination of passenger service by FEC drastically reducing the jobs available for firemen; the unlikelihood of the recovery of punitive damages. Giving due consideration to these factors, the monetary settlement equal to two full years of an estimated post-strike firemen's payroll, without any deductions, was approximately equivalent to the amount which might have been ultimately recovered in court. Other factors to be considered which might have severely impaired liability were the possibility of Supreme Court review of the basis of liability (this Court has never ruled upon the availability of the "back-pay" sanction under the Railway Labor Act or the collective standing of individuals in the context of a "major dispute"); other available defenses by the FEC, including a contention regarding the statute of limitations, and pre-strike agreements under which the FEC claimed the right to eliminate many, if not all, firemen.

A separate agreement which was dependent upon the final approval of the settlement was also to be concluded between FEC and the International Association of Railway Employees (IARE)[5] which would eliminate the job classification of locomotive firemen for the future, but would provide job opportunities for all qualified employees holding firemen's seniority in the other operating crafts of FEC such as engineer, trainmen, conductor, etc.

As on many southern railroads, during the pre-strike era on FEC there was racial discrimination which limited Negroes to jobs within the class of locomotive firemen in operating employment. The ordinary railroad practice of promotion from fireman to engineer had been limited in its pre-strike application to white employees. In the post-strike era FEC had eliminated racial discrimination in this regard and had promoted many returning firemen to engineer and other operating positions. While it was undoubtedly FEC's need for experienced personnel who would cross picket lines which prompted this change, it did, nonetheless, have this beneficial effect. The December 30, 1969 agreement codified and protected the status of returning firemen who had been promoted and maintained the opportunity for continued railroad employment for any individual holding firemen's seniority who desired to do so. In addition each fireman who became an engineer or who accepted other operating positions would have as his seniority date his original date of hire and not the date of his recent promotion. One effect of this provision was to overcome the years of discrimination.

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[5]IARE is the labor organization which was the collective bargaining representative for FEC's locomotive firemen.

D. Formulation of the Compromise Proposal

Following the denial of the FEC's petition for rehearing to the Court of Appeals on October 16, 1969, FEC requested a stay in the District Court while it sought review of the decision via a petition for certiorari to the United States Supreme Court. A hearing was held on this motion on Monday, December 22, 1969 and the District Court denied the requested stay, ordering the FEC to respond to the complaint on or before January 30, 1970 (R. 19). In the afternoon following this hearing, the initial conference regarding the possibility of some settlement being reached in the case was held in Jacksonville between counsel and representatives of the FEC. (R. 182).

At this meeting and subsequently, it was firmly stated that FEC was interested in a settlement only if it could actually transfer settlement funds prior to the end of the calendar year in order to take advantage of its unique tax situation for calendar year 1969. If this could not be accomplished FEC was not interested in settlement. (R. 182). Following this meeting, during the remainder of the week which included the Christmas holiday, telephone conversations were carried on between counsel concerning the outlines of a proper settlement. Nehemiah Mungin who was the leading spokesman for the class was contacted by counsel on December 26 and 27, 1969 and he advised that counsel should use their judgment in seeking what was best for the men. (R. 183).

On Sunday, December 28, 1969, counsel traveled to Atlanta to meet with FEC counsel and on Monday, December 29 at approximately noon the final outlines of the proposed settlement were reached. These included the

payment by FEC of $800,000.00 into a Trust to be administered under the direction of the Court. Shares in the trust were to be allocated to individuals in accordance with a formula which took into account their actual earnings as locomotive firemen in the pre-strike period, and their availability to perform service for the FEC during the post-strike period. Individuals who were deceased or had retired pursuant to the provisions of the Railroad Retirement Act were to receive proportionately reduced shares.

Another aspect of the settlement proposal was the formal maintenance of the suit as a class action, which had been required in the opinion of all counsel by the Court of Appeal's initial opinion in the case.

Following the determination of the outlines of settlement, General Chairman Carter and President Whitaker of the IARE were contacted by counsel on December 29th and advised of the settlement proposal. On December 30th they met with counsel in Jacksonville and agreed that the settlement proposal and the proposed collective bargaining agreement were fair, adequate and reasonable and merited submission to the men for their acceptance or rejection. On this date President Whitaker and General Chairman Carter authorized counsel to file an appearance on behalf of the IARE, to intervene in the suit on its behalf, and to take all steps necessary on behalf of the IARE as an entity to progress the settlement proposal in order that it might be presented to the firemen. Counsel did not ask for nor did they receive any fee from the IARE. The sole purpose of the formal participation by IARE in the suit was to enable the proposed compromise and settlement to be presented to all members of the craft for acceptance or rejection.

In order for the settlement proposal to be a possibility and to enable the funds to be actually transferred from FEC prior to the end of calendar year, 1969, on the afternoon of December 30, 1969 a hearing was held before Honorable Charles R. Scott, District Judge. At this hearing the documents which comprised the proposed settlement and compromise were presented to the Court and the settlement proposal was thoroughly explained to the Court, and preliminary approval of the settlement was granted by the Court. (R. 53). Specific provision was made in the Court's preliminary order for a formal notice (R. 78-9) of the proposed settlement to be given to every individual who held seniority as a fireman on FEC (which included many engineers who held dual seniority), including notification of each individual of his actual dollar share of the funds available if the proposed settlement were to be finally accepted by the men and approved by the Court.

E. Presentation of the Compromise Proposal

Conveniently, in the petition, petitioners make no reference whatever to the extensive meetings, discussions, correspondence and other communications between counsel and class members between the initial preliminary hearing on December 30, 1969 and the final hearing of March 11, 1970, a period of three and a half months. Petitioners would imply that the formal Notice of February 4, 1970 was the only information to which they had access prior to the final hearing. This is patently false.

Following the initial hearing of December 30, 1969, meetings were arranged to be held in Miami, New Smyrna

Beach, and Jacksonville on January 10 and 11, 1970 through the various IARE lodge officers.[6]

At these meetings, which were attended by all of the petitioners, the settlement proposal, including all of the considerations for and against it, were discussed and explained. (R. 250-1; 184-5). Every aspect of the proposal including all of the implications of the IARE agreement were thoroughly discussed, and every question was answered fully and to the best of counsel's ability. (R. 184-5). It was made perfectly clear that the settlement proposal was not final in any sense and it was up to the men to determine whether they desired to accept it or reject it. All were advised that the settlement proposal was made on the basis that it would have to be accepted by all of them or that it would be available for none of them, and that if by the objection of one or more individuals the settle-

[6]Through the progress of this suit since its inception in the summer of 1967 and indeed since 1965 when counsel first undertook the representation of most of the IARE membership in Florida, a principal means of communication between attorneys and clients have been meetings held in Miami and New Smyrna Beach and at times in Jacksonville. The principal places where FEC firemen live are Miami and New Smyrna Beach, where the two IARE lodges are located. In addition a few live in Fort Pierce and Jacksonville. (The FEC pre-1963 crew terminals, or division points, were Jacksonville, New Smyrna Beach, Fort Pierce and Miami). The meetings had been held from time to time during the litigation for the purpose of explaining and discussing various aspects of the litigation. These meetings were particularly important for men located on the north end of the system since counsel have their offices in Miami. Over the years at various times most Jacksonville and New Smyrna Beach firemen have conferred with counsel in Miami but it was obviously much easier for Miami men to come in to see counsel individually or in groups.

The meetings, however, were used as an addition to and not in lieu of the more conventional means of communication between attorneys and clients, such as correspondence, phone calls, office visits, etc., all of which were extensively used over the years and during the early months of 1970. (R. 184-6).

ment were blocked, it would be blocked for all. The one question which could not be answered at these initial meetings was the amount of money which each individual would receive as his share of the settlement funds, since this information was not yet available.

The data concerning pre-strike earnings of the entire class membership, and of their eligibility based upon the deaths and retirements of many class members was being assembled during the month of January and fed into a computer to determine the dollar amounts of every individual's share. (R. 62-75). At the meetings all were advised that they would receive a statement specifying the actual dollar amounts, along with the formal notice which each would receive concerning the final hearing. Each of the meetings closed with expressions of appreciation for the services of counsel.

Another meeting was held on January 15, 1970 in New Smyrna Beach and all of the considerations of settlement were again fully and thoroughly discussed. (R. 187-8). All during the remainder of the month of January and early February there were literally hundreds of telephone conversations between counsel and class members with regard to the settlement proposal, answering questions, explaining various aspects and ramifications of settlement, discussing the formula for distribution and individual shares, etc. (R. 185-6).

On February 4, 1970 the formal notice of hearing was mailed to every person holding firemen's seniority as of January 23, 1963. (R. 78-79). In addition, on February 4, 1970 letters were sent to each individual showing the actual amounts to be received by him pursuant to the settlement

proposal if finally approved. In the weeks following the sending of the February 4 Notice there were numerous telephone and in person conversations with many class members, and no opposition to the settlement proposal was expressed by any individual. Additional meetings were arranged for Miami and New Smyrna Beach prior to the final hearing which had been set for Wednesday, March 11, 1970.

At the Miami meeting attended by some 15 to 20 individuals, all aspects of settlement were again discussed. One individual expressed himself as being in opposition to the settlement, but that he did not wish to block settlement for everyone else, and would therefore accept it.

At the New Smyrna Beach meeting all factors concerning the settlement were again discussed. All were again advised that the settlement proposal was one which was a single settlement for the entire class, and that if the settlement were blocked through the objections of one or more individuals it would be blocked for all.

F. Final Hearing

At the final hearing on March 11, 1970, all of the petitioners were present in the courtroom. Three individuals, H. A. Crump, W. J. Howard and Leandrus Jorden testified.

The attitude of the Court and the position taken by these individuals is very clearly expressed in the following colloquy between Judge Scott and Mr. Crump:

"THE COURT:

Well, do you want me to look after you and block the settlement as far as all the others are concerned?

MR. CRUMP:

No, I don't want you to do that.

THE COURT:

Well, tell me what you want me to do.

MR. CRUMP:

I'm asking you to ask the defendant to compensate me additional money to make it a fair settlement for me.

THE COURT:

How can I do that when they've already paid the money, $800,000.00 into the registry of the Court, and if I require them to do that, then the whole settlement is gone, it's blown up, it's out the window, and you all can start over again and figure out what you want to do, if anything, and see if, as and when you get your money. I don't know, but you're the one that's going to have to make that decision. If you tell me you want the whole settlement blocked, why I'll give consideration to it.

MR. CRUMP:

> *I don't want to tell you that. There are too many men sitting up here who are happy with their settlement* but as I said, I feel that my case was different and this is why I made the complaint." (R. 103-4). (Emphasis supplied)

This was the position taken by individuals who wished to be excluded from the settlement prior to its final approval on March 11 by Judge Scott. Judge Scott clearly approached the matter with a completely open mind, as the transcript of hearing plainly reflects. (R. 85-133). The heart of the matter is that not a single member of the class, including the 125 who received compensation and some 75 others holding seniority who did not receive a share of the settlement funds, none of whom are among the petitioners, raised an objection which they wanted to have considered as a basis for blocking the settlement for all. (R. 251). Under these circumstances there can be no doubt whatever that Judge Scott acted appropriately in approving the settlement and entering final judgment to that effect on March 11.

G. Post Judgment Proceedings

The settlement called for the initial payout of $300,000.00 to the individuals entitled to benefit on April 1, 1970. These checks were issued on March 31, 1970 and distributed by mail to all persons benefited. In the interim between March 11 and the April 1 distribution there was still no indication whatever of opposition to the settlement.

As was later revealed (R. 203-9, 247), the petitioners waited until every person had received his first share of the settlement funds, prior to making any effort whatsoever to express disapproval or dissatisfaction with the settlement which might block it for all. Indeed, the petitioners first effort to contact anyone with regard to opposition was delayed until April 4, 1970, well after cash was actually in hand. A notice of appeal was filed on April 10, 1970 and it was only upon receipt of this notice of appeal that any indication of opposition to the settlement was given to counsel for the respondents.

Following the filing of the Notice of Appeal, on May 29, 1970 the petitioners together with several other individuals filed a Motion for Relief from Judgment under Rule 60(b). The petitioners filed a Motion to Stay the proceedings in the Court of Appeals until the District Court had had an opportunity to rule on their Motion for Relief from Judgment. Respondents did not oppose that stay which was granted on June 11, 1970.

A hearing was held on the Motion for Relief on June 29, 1970, after which the Court took the matter under advisement and called for briefs. On August 11, 1970 the District Court issued its Findings of Fact and Conclusions of Law (R. 245-275), denying the Rule 60(b) motion. No Notice of Appeal was filed by the petitioners directed to the denial of their 60(b) Motion.

The Court of Appeals entered its Per Curiam affirmance of the District Court on April 19, 1971. (A. D1).

ARGUMENT

The decision below, a Per Curiam Affirmance by the Court of Appeals under its Rule 21, correctly deciding the appeal and certifying "that an opinion would have no precedential value",[7] clearly does not warrant the grant of certiorari by this Court.

The thinnest of veneers is applied in the Petition as alleged reasons why this Court should exercise its discretion to review the decision below. The Petition consists of wholly unfounded assertions of "near scandal" and "rumors of irregularities", the sole thrust of which are that the decision below was incorrect. No conflict of decision is presented, nor any issue of general importance and the decision below was eminently correct.

The crux of the dispute here is really a matter of conflicting legal advice given to the petitioners. The petitioners were advised by their counsel (Milledge and Horn) prior to the final hearing that the Court of Appeals decision was not a decision on the merits of their case, and that numerous legal and factual defenses remained to be tried, as well as possible review by the Supreme Court of the basis of jurisdiction, standing to sue, and back pay liability. They were advised that as a result of the representative capacity specified in the Court of Appeals opinion by virtue of which they had standing to sue, all members of the class would have to be included in the law suit and in any settlement. They were further advised that the proposed compromise and settlement was fair, adequate and proper as a resolution of the dispute in

[7]See footnote 1, and text at pp. 4-5, *supra*.

light of all the circumstances and taking into account the varying circumstances of all members of the class. Finally they were advised that the proposed settlement and compromise was a single offer to settle with all, which could be accepted or rejected, but that if the settlement were blocked for one it would be unavailable for all.

This advice, which we submit was proper and correct, led to final approval of the settlement by the Court, on March 11, 1970, with not one person opposing the overall settlement either in communication to counsel (R. 186) or to the Court. (R. 251).

On April 4, 1970 following final judgment, after the receipt of their initial settlement benefits on April 1, 1970, pursuant to the final judgment, and after every member of the class had similarly received benefits, the petitioners first sought to retain other attorneys who ultimately advised them that the Court of Appeals decision was a decision on the merits,[8] that the liability of the FEC was "clear" and "certain",[9] and that the sole matter remaining in the lawsuit was the determination of damages.[10] They were advised that a class action was not required, was improper, and that each individual had had a right to "opt out" of the class action and to proceed individually and separately against the FEC.[11] This position was later retracted by petitioners' counsel in the District Court, (R. 217, 237-8). They were advised that the amount of settlement was grossly inadequate, based upon the prayer

[8]Transcript of Hearing, June 29, 1970, p. 69. (R. 220-1).

[9]Ibid., p. 63, 70. (R. 219, 221-2).

[10]Motion for Relief from Judgment (R. 139).

[11]Ibid. (R. 138).

for relief in the complaint.[12] Finally they were advised that they could keep the settlement benefits which they had already received, while simultaneously seeking to set the settlement aside,[13] and that it might be possible to set the settlement aside for some of the class without affecting the settlement for others.

This advice and these representations of petitioners' counsel are erroneous, but form the basis for petitioners alleged desire to destroy the settlement.

A. *The Petitioners, Prior to Final Judgment and the Receipt of Benefits by all Entitled Class Members, Never Communicated to Counsel or to the Court a Position in Opposition to the Settlement in its Entirety which might have Blocked the Settlement for All.*

A false theme running throughout the Petition is that the petitioners "opposed" the compromise and settlement, or "dissented" from it, or "challenged" it prior to their receipt of funds pursuant to its terms on April 1, 1970. The fact of the matter is that not a single member of the class including all of the petitioners raised any such "opposition", "dissent", or "challenge", if this would mean that the settlement and compromise would be unavailable for all other members of the class (R. 251).

The record reflects that the petitioners neither prior to nor at the final hearing sought to block the settlement proposal, but rather the three individuals who testified

[12]Ibid., (R. 139).

[13]Ibid., (R. 140).

at the Final Hearing expressed a desire to have individual treatment accorded to them if such could be granted by the Court without blocking settlement for all. (R. 251). This position was faithfully communicated to the Court by their counsel, and the Court repeatedly asked these individuals if they desired to block the settlement for all. The question of the acceptance or rejection of the compromise proposal was a completely open question at the final hearing of March 11, 1970.

All of the class were fully advised and completely aware of the basis of the settlement proposal which was a settlement for all or a settlement for none. A sense of loyalty and community of interest and the overwhelming support of the class for the settlement proposal was accepted by all as the consensus prior to April 1, 1970, and upon which counsel and class members alike acted.

The assertion is made by counsel for petitioners that the petitioners were "abandoned" by their attorneys prior to the final hearing. There is no basis whatever for this assertion. No one prior to April 4, 1970 and the receipt of sums in settlement by the entire class, opposed the settlement, upon the basis which they were correctly advised by counsel, that the suit was necessarily a class action, and that the settlement was for all or for none.

At no time prior to or during the final hearing did any class member make any statement to counsel, or to the court that he desired to have his individual request for separate treatment, if possible, considered as a basis for blocking the settlement for all. There were no "opponents", "dissenters" or "challengers" to the settlement in its entirety until after the final judgment and the disbursement

of funds to all. The timing of their sudden, apparent change of position once they had their cash in hand on April 4, 1970 goes far to show that no opposition to the settlement for all was contemplated by petitioners at least until after they and everyone else had secured the benefits of settlement.

B. *The Formal Notice sent to Every Class Member Over a Month Prior to the Final Hearing, Including the Advice as to the Actual Amount He Would Receive Pursuant to the Settlement Proposal if Finally Approved, Was Proper and Adequate.*

The Petition alleges that a defect in the procedure followed in the District Court was the form of the formal notice sent to every individual member of the class, pursuant to Rule 23(e). In this connection they cite *Birnbaum v. Birrell*, 17 F.R.D. 409 (S.D.N.Y. 1955) a case where the Court found that a formal notice simply published in New York 10 days prior to the Final Hearing was inadequate for 7,500 stockholders scattered throughout the country.

Petitioners assert that the effect of the notice sent to each class member over a month prior to the Final Hearing (A. E 1-3) was to "chill" (Pet., p. 18) their response and to shift a "burden of proof" from the "proponents" of the settlement to the "dissenters".

First, of course, there were no "dissenters" to the compromise and settlement prior to the entry of the final judgment and the initial payment of $300,000.00 to the class on April 1, 1970. The individuals who testified at

the final hearing were entirely in accord, at that time, that they did *not* want their request to be treated individually to be taken as opposition which might have the effect of blocking the settlement for all. (R. 251). The colloquy between the Court and appellant Henry Crump set out at pp. 17-18 *supra*, makes the position of those who testified perfectly clear. If their requests for individual treatment could not be accorded without blocking the settlement for all, they did *not* want to stand in the way of the settlement.

The effort made in the Petition (Pet., p. 17) to make it appear that Judge Scott was less than completely courteous, fair and open-minded at the final hearing is utterly without basis, as the transcript of hearing (R. 85-133) fully shows.[14]

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[14] *E.g.*, Addressing Mr. Crump (See Pet., p. 17) the Court stated:

THE COURT:

* * * "I've got your letter, I'm happy that you are here this morning. I think it's good that you're able to say what you've got in back of your mind and say how you feel because this is a free American Country and it's good that we can do it this way, but you're the one that's going to have to make the final decision. And let the attorneys ask you some questions if they care to and I'll hear from you further, unless there is something more you have to say now.

* * *

MR. CRUMP:

I appreciate you giving me the opportunity to express myself.

THE COURT:

That's all right, I'm glad that we have that kind of a way of life in this country and I hope it's always with us.

MR. CRUMP:

Thank you, this is a democratic society. (R. 105, 106).

Indeed, counsel for petitioners when presenting their Motion for Relief from Judgment admitted that based upon the record before him Judge Scott acted correctly in entering final judgment.[15]

C. *There was no "Conflict of Interest" Between the Class and its Collective Bargaining Representative. Counsel did not Represent Adverse or Conflicting Interests.*

The final allegation of defect contained in the Petition was an alleged "conflict of interest" on the part of counsel who represented both the class members and their collective bargaining representative, IARE. There was no "conflict of interest".

IARE filed its motion to intervene and complaint seeking the identical relief in virtually the identical language with that filed in behalf of the class. IARE as the duly designated collective bargaining representative under the Railway Labor Act was the sole entity empowered to enter into collective bargaining agreements with the FEC. As a part of the proposed settlement, IARE entered into an agreement with the FEC which abolished the position of locomotive firemen for the future, and accorded the right to promotion to an operating position with the FEC to employees holding firemen's seniority.

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[15]Transcript of Hearing, June 29, 1970, p. 62 (R. 218).

"MR. CAPELLE:

I think, insofar as you have stated, that the Court, based on the information it had before it, made a correct decision. We have no argument that you overlooked some point or that you acted wrongfully."

Notice that this agreement was a part of the settlement was formally contained in the February 4, 1970 Notice and it was fully discussed in the meetings held prior to the Final Hearing. IARE became a party to the suit and at all times was in accord that the settlement proposal which was finally approved by the Court on March 11, 1970 was fair, adequate and reasonable for the class. IARE authorized counsel who had been retained by the class members to appear for it.

Petitioners make vague reference to "other litigation" (Pet. p. 19) as showing some basis of conflict. Judge Scott who had decided that other litigation, *Harrison v. F.E.C.*, No. 65-366-Civ-J (M.D. Fla. 1967) specifically found that "No showing of I.A.R.E. bad faith was made in that case, but apparently I.A.R.E. acted in good faith, albeit without proper authorization." (R. 261).

IARE's agreement to join in the submission to the class of a plan of settlement hardly makes it a party adverse to the class composed of its members. Clearly in this litigation, IARE as an entity, and its members were not "adverse parties", and counsel did not, in any sense, represent "adverse parties".

The possibility that some plaintiffs might wish a particular settlement and some might not is always inherent in the representation of multiple plaintiffs and the possibility increases as the number of plaintiffs increase. It is nowhere suggested however that counsel should not have undertaken to represent substantially all the locomotive firemen. Certainly petitioners consented to this multiple representation.

If there had been dissension prior to or at the final hearing involving opposition to the entire settlement where some plaintiffs desired to settle and others did not a potential situation of conflict would have existed.

The answer is simply that as of the final hearing there were no dissenters to the entire settlement. No one who testified, nor *anyone* else wished to oppose settlement, if, as a consequence thereof, settlement for the entire class would be denied.

CONCLUSION

In the Rule 60(b) proceedings in the District Court, the facts were developed which demonstrated that each of the petitioners had accepted and retained the first payments under the terms of the settlement and final judgment. (R. 253-5). Not one of the petitioners has actually tendered the funds or checks which they have received back into the registry of Court or to the Trustees of the settlement fund. The net effect of this failure to return the benefits, is to permit the petitioners to enjoy the benefits of settlement and final judgment while simultaneously seeking to destroy them for all. The consequences of setting aside the settlement and final judgment to the more than one hundred class members who have received and used the benefits of settlement in reliance upon the petitioners consent to settlement at the final hearing and petitioners acquiescence thereafter until all class members had received their compensation would be disastrous in fact. There was no disbursement "in the face of known dissent" (Pet. p. 21) as alleged in the Petition. The record shows that petitioners made no effort to express dissent to anyone, or even to attempt to contact other attorneys until April 4, 1970, after all had cash in hand.

There is no issue worthy of review presented by this case. Fair and adequate notice of the proceedings accompanied by proper advice of counsel led to the approval of the compromise and settlement with no class member opposed to the entire settlement. Counsel represented no conflicting or adverse interest from that of the plaintiffs and the class represented, and in no sense "abandoned" anyone.

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief in Opposition was delivered by air mail this _____ day of September, 1971, to the following counsel:

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 13 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-93

WALTER J. HOWARD, LEANDRUS JORDEN, ARTHUR L. DAVIS, WILLIE E. JORDAN, GORDON ROGERS, MOSES MEEKS, JAMES L. SIMS AND H. A. CRUMP, INDIVIDUALLY AND AS MEMBERS OF A CLASS,

Petitioners,

versus

FLORIDA EAST COAST RAILWAY CO., INC. AND NEHEMIAH MUNGIN, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FLORIDA EAST COAST RAILWAY COMPANY IN OPPOSITION

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BRIEF FOR FLORIDA EAST COAST RAILWAY COMPANY IN OPPOSITION

OPINIONS BELOW; JURISDICTION

The relevant opinions and judgments of the Court of Appeals and the District Court rendered in this case have been printed as Appendices A, B, C and D to the Petition herein (Pet. App. A1-A35, B1-B3, C1-C18,

D1-D3).[1] The proper basis of jurisdiction has been stated.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether certiorari should be granted to review a *per curiam* affirmance by the Court of Appeals of a District Court judgment approving the compromise and settlement of a class action and an opinion containing detailed findings of facts and conclusions of law denying relief from judgment where:

(1) The District Judge, who was "in the locomotive cab" giving "careful superintendence to his railroad duties" and was fully informed and aware of all relevant facts and circumstances, held the suit was properly a class action and approved the compromise and settlement as "fair, adequate and reasonable" after due and complete notice to all class members and hearing thereon; and

(2) No class member opposed the overall settlement and compromise and only three of over 200 class members stated any type of opposition thereto, that opposition being limited solely to a desire for a larger individual share; and

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[1]References to the appendix to the petition will follow the pagination therein and will be made as "Pet. App."

References to the petition for writ of certiorari are made as "Pet."

References to the appendix in the Court of Appeals are made as "R".

(3) All but two class members have accepted cash benefits as part of payments totalling $300,000 of the settlement sums, pursuant to the settlement terms, and even these two are holding their checks, and no one has offered to restore the $300,000 paid out to the class.

STATEMENT OF CASE

This case involves a settlement and compromise of a class action maintained on behalf of the locomotive firemen of the Florida East Coast Railway Company (hereinafter FEC). The settlement included money damages of $800,000, which actually will amount to nearly $900,000 by investment during the two-year payout period.[2] Promotional opportunities for firemen to other operating crafts, concomitant with abolition of firemen jobs, was provided. *The consideration given in settlement has in no way been challenged here and the overall propriety of the settlement sum and contract is not attacked.* Petitioners only attack the means used to accomplish this unassailed end and seek a bigger division of the spoils. (See Pet. 11).

Understanding the significance and validity of the settlement requires at least preliminary reference to two important factual backgrounds — the status of firemen in the railroad industry and the extended strikes and related litigation involving FEC and its employees. Both of these are further detailed in the argument below. It is common knowledge, especially to the federal

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[2]Further payouts contemplated by the settlement have been stayed below pending first the appeal and now this petition.

judiciary, that there has been a protracted dispute concerning the necessity for and use of firemen on diesel locomotives, festering for nearly fifty years. This controversy has centered around whether firemen are necessary at all on any trains, with the carriers claiming technological advances have rendered them obsolete and the unions replying they are still needed, both to operate the trains and to satisfy safety requirements. Literally millions, perhaps billions, of man hours have been expended by Presidents, judges, Congressional members and staffs, Labor Department personnel, special mediators and board members, arbitrators, attorneys, carriers and unions seeking a solution. Here one was found if only for one railroad and its employees. This railroad was further unique in that it and its employees were and are involved in the longest strike in the nation's railroad history, reference to which has already been made by Petitioners, see Pet. 4, and by the Court of Appeals, see Pet. App. C1-C2, fn. 1. As a consequence of that strike and related developments, most of the persons holding fireman seniority had not worked for FEC for seven years or had worked only during part of that time. The strike context raised a myriad of problems concerning the rights of the firemen to back pay such as offers of reinstatement, offers to return to work, refusals to cross picket lines, interim earnings, reasonable attempts to find interim employment, receipt of railroad unemployment compensation benefits, etc.

Against this background this case was originally filed in 1967 and the Court of Appeals finally held in 1969 that the complaint stated a cause of action on behalf of the entire craft over which the District Court

had jurisdiction, see Pet. App. C1, ff. At that juncture, FEC prepared to seek a writ of certiorari from this Court and a petition was actually prepared, but was never filed, although extensions of time to do so were granted by this Court, because in the interim the settlement had been reached. That petition would have involved a substantial undecided question — the power of a federal court to grant back pay as an equitable sanction for violations of the "major" dispute "status quo" provisions of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh, 156. The Court of Appeals decision that such power existed might have been reversed. No trial had been had and the firemen yet had to prove the allegations of their complaints and to establish their individual entitlements to back pay in any amount.

In this context, settlement negotiations were conducted in late December, 1969, FEC stating that if these were not brought to fruition before the year's end so certain tax benefits could be realized, it would not settle but would pursue its petition for certiorari and its defense of the case. In light of the Court of Appeals holding that the suit presented "a claim on behalf of the entire craft (of firemen) whether represented or not" and that it was being remanded for "the granting of whatever relief is appropriate" (Pet. App. C18), which could encompass "reinstatement and reconstruction, so far as practicable, of the status quo" (Pet. App. C17) including perhaps "reinstatement, back pay, injunctions and the like" (Pet. App. C12), the necessity of resort to a class action under Rule 23 of the Federal Rules of Civil Procedure was plain to all counsel.

Appropriate steps were, therefore, taken to realize the settlement and to present it for preliminary approval to the District Judge so that payment by FEC could be made prior to the end of the year. At a hearing on December 30, 1969, the various motions and pleadings concerning the conversion to a class action and IARE intervention, as well as the settlement proposals, were presented to the District Judge. The proposed compromise was explained fully, including the formula of distribution, the determination of individual shares, and the collective bargaining agreement. Judicial approval of the collective bargaining agreement, the propriety of which is questioned apparently by Petitioners (Pet. 15), was secured because the injunction in *U.S. v. F.E.C. Ry. Co.*, No. 64-107-Civ-J (M.D. Fla), upon which the Court of Appeals placed so much emphasis in finding a cause of action had been stated (Pet. App. C4-C8, C11), had been construed apparently by the same District Judge as requiring an order by the Court before FEC could implement changes in working conditions either after exhaustion of the processes of the Railway Labor Act or after successful collective bargaining. *Id.*, Order of September 23, 1968, finding FEC in civil contempt for placing changes into effect after exhaustion of Act's processes but without prior approval of the Court. The settlement in every detail was conditioned upon *final* approval of the Court after notice to the class and a hearing on final propriety. The December proceedings and orders were solely *preliminary*. The District Judge, whose discretion in class action settlements is invoked, was fully aware of this significant situation, so he pointed out in his later opinion (Pet. App. A4-A5, para. 10-12, A21-A22, para. 7).

Thereafter, numerous meetings, exchanges of correspondence and telephone conversations were had between the members of the class, including Petitioners, and their counsel, Milledge & Horn (Pet. App. A7, para 16; Affidavit of Allen Milledge, Esq., R184-186): The notices to all class members in the form ordered by the Court (Pet. App. E1-E3) were mailed on February 5 and 6, 1970 (R. 76), some 32 days before the March 11 hearing on whether final approval of the compromise should be entered. The notice told the class members of the class action motions and order, the grant of intervention, the proposed settlement and collective bargaining agreement, the preliminary approval, the location of all documents, and the time and place to be heard on final advisability of the settlement. Full explanation of the details of settlement were given the class members in the several meetings with their counsel in January, 1970 (R. 184), and March, 1970 (R. 185-186). The Petitioners complain that full copies of all the documents were not mailed to the class members, who it is alleged did not live in Jacksonville and, it is thus inferred, were faced with an undue burden of traveling there to examine those documents at the Clerk's Office (Pet. 18-19). However, the affidavits of Petitioners submitted to the District Court in support of their Motion for Relief from Judgment show that the Petitioners lived in New Smyrna Beach, Florida (Howard - R. 141; Jorden - R. 156; Davis - R. 144; Rogers - R. 168; Meeks - R. 162; Sims - R. 176; Crump - R. 147). New Smyrna Beach is only about 115 miles south of Jacksonville and they are connected by a high-speed interstate highway, I-95. Thus, Petitioners could not apparently bring themselves to suffer the incon-

venience of a four-hour round trip automobile ride to find out anything they wanted to know.

At the hearing on March 11, apparently the Petitioners had decided the automobile ride was not too far for they were present (Howard - R. 143; Jorden - R. 157; Davis - R. 146; Rogers - R. 172; Meeks - R. 244; Crump - R. 151). Only Howard, Jorden and Crump testified. The others were silent. The testimony of these three was only concerned with their desire to get a bigger individual share and each stated he did not wish to be understood as opposing overall settlement. After this hearing the District Court then finally approved the settlement. Thereafter followed the unsuccessful attacks on the judgment in the District Court, the unsuccessful appeal and now this petition. Also, the first payout of settlement proceeds was made in the amount of $300,000. Every class member but two cashed his check and kept the proceeds. Petitioners Howard and Meeks did not cash their checks, which totalled about $6,100.00 less attorney's fees, so nearly $295,000 worth of payout has been accepted and used by the recipients. Howard and Meeks have kept their checks.

ARGUMENT

This case simply does not present any occasion for the exercise of the certiorari powers of this Court. No conflict of appellate decisions is presented. No substantial federal question is presented. The judgment and decisions of the District Court and the Court of Appeals were eminently correct and fully considered and rejected Petitioner's attacks upon the settlement itself

and the settlement procedures. Although a strained attempt is made apparently to invoke the supervisory powers of this Court; the record amply demonstrates that there is no necessity for the exercise of those powers and no reason why this case would be appropriate for such exercise.

The Court of Appeals, following full presentation by Petitioners of their arguments, affirmed the District Court *per curiam* and without decision under its Rule 21.[3] The Court of Appeals does not invoke Rule 21 lightly, recognizing its use involves a "heavy obligation" in view of its opinion-writing function important both to the parties before it seeking resolution of their case and innumerable others seeking guidance in the future. It is "vigilant" to the sensitivity necessary to its role and indeed a unanimous decision of appropriateness is required before Rule 21 is used in any case, a decision-making process designed to insure Rule 21 will be carefully and selectively employed. See *N.L.R.B. v. Amalgamated Clothing Workers, etc.*, 430 F.2d 966, at 971-973 (5 Cir. 1970). Thus, the use of Rule 21 in

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[3]Rule 21 provides:

> When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: (1) that a judgment of the District Court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the Court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21" or "ENFORCED. See Local Rule 21."

this case reflects an informed and mature judgment that the District Judge's "findings of facts ... are not clearly erroneous", that there was no "error of law", and that the case is such that "an opinion would have no precedential value." This scarcely is the type of case that should clog the docket of this Court.

The settlement itself, explicitly found "fair, adequate and reasonable" by the District Judge, and which the Court of Appeals also approved implicitly, is not apparently attacked here except by innuendo and inference. It hardly could be attacked considering all the circumstances of this case, including the background of the dispute over the use of firemen and the long strike on FEC, both of which were fully known to the District Judge, and which are set out in some detail now for the benefit of this Court.

First, the use of firemen on diesel locomotives is itself one of the most hotly-contested questions in railroad industrial relations, occupying not only exorbitant amounts of time of railroads, their employees, and the employees' unions in seeking a settlement, but also spilling over into this Court, (see *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R.*, 372 U.S. 284 (1963), *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific R. Co.*, 382 U.S. 423 (1966)), Courts of Appeal and District Courts (see *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 385 F.2d 581 (D.C. Cir. 1967), cert. den. 390 U.S. 923 (1968), *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 380 F.2d 605 (D.C. Cir. 1967), cert. den. 389 U.S. 928

(1967), *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 411 F.2d 329 (5 Cir. 1969), *Brotherhood of Locomotive Firemen & Enginemen v. Atchison, Topeka & Santa Fe Ry. Co.*, 442 F.2d 794 (D.C. Cir. 1971)), the National Mediation Board (see *Brotherhood of Locomotive Firemen & Enginemen v. National Mediation Board*, 410 F.2d 1025 (D.C. Cir. 1969), cert. den. 396 U.S. 878 (1969)), Congress (see Public Law 88-108, 77 Stat. 132), and several Presidents (see *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, *supra*, at 589-590 *Report to the President by Emergency Board No. 177*, August 6, 1970, see especially Appendix B).

This "ancient issue",[4] involving "twin problems of automation and technological unemployment",[5] was and is indeed a "sensitive and touchy problem."[6] Even though "due to gradual technological changes the traditional functions of the Fireman had become largely obsolete",[7] leading the most recent Presidential Emergency Board to voice a melancholy echo of the unanimous findings of neutral members of prior Boards that "there is no need for firemen on freight and yard diesel locomotives except under rare operating conditions",[8] this "futile",[9] "irrepressible"[10] controversy has drag-

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4380 F.2d at 607, per Judge Burger.
5382 U.S. at 438, per Justice Douglas.
6382 U.S. at 430, per Justice Black.
7410 F.2d at 1035, per Judge Burger.
8Report of Emergency Board No. 177 at p. 4.
9410 F.2d at 1035, per Judge Burger.
10411 F.2d at 322, per Judge Brown.

ged on, generating an "unhappy history of wasteful strife."[11]

By contract, in the present case, the longed-for "responsible accord"[12] has been reached, involving a recognition of technological reality[13] and providing a means to fulfill the firemen's "quest to become engineers."[14] Rather than snidely characterizing this as a "quickie collective bargaining agreement"[15] and implying that it was somehow a failure of faithful representation, it would seem more appropriate to recognize the "high order of union statesmanship"[16] on IARE's part in helping secure for the firemen it represented payment for the past and hope for the future. The collective bargaining agreement here resolved the status of locomotive firemen on FEC by ratifying previous promotions of many firemen to engineer and hostler positions, and by offering opportunities for promotions of other firemen to any operating position — brakeman, yardman, hostler, engineer or conductor. Under the working agreement covering operating positions these promoted firemen could carry forward their total accrued seniority into the other crafts, thus protecting

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11 410 F.2d at 1035, per Judge Burger.

12 385 F.2d at 589, per Judge Leventhal.

13 See the agreement itself at R. 46. FEC has no passenger service. FEC uses diesel locomotives which are operated solely in freight and yard service.

14 410 F.2d at 1035, per Judge Burger.

15 Pet. 19.

16 410 F.2d at 1035, per Judge Burger.
It was especially appropriate here where an earlier agreement involving the physical condition dispute had already been held void. *Harrison v. FEC Ry. Co.*, No. 65-366-Civ-J (M.D. Fla. 1967). Many firemen had not worked for seven years, many

them against layoffs, giving them a fair chance for work opportunities, and overcoming any past years of racial discrimination. IARE had sought such a promotion rule in the past (R. 280, para. 2). A provision for resolution of disputes over the physical condition of firemen by use of a neutral doctor was included.[17]

On the other hand, there had been "a decade of industrial strife as the Nation's longest railroad strike", all of which had spilled over into the District Court, the Court of Appeals and this Court. See Pet. App. C1-C2, fn. 1. The District Judge here involved, Judge Scott, had been in the "locomotive cab" since 1967 and had "given such careful superintendence to his railroad duties" (Pet. App. C2, C9) and was fully aware of the *Harrison v. FEC Ry. Co.* case, which he had decided, plus the ongoing developments in *U.S. v. F.E.C. Ry. Co.* over which he was presiding in the aftermath of earlier opinions of this Court and the Court of Appeals upholding preliminary injunctive relief. He was also aware of other pending litigation involving FEC and its operating employees all of which were assigned to him.

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were of advanced age, and there were many serious questions involving whether individual firemen were physically fit to perform the duties of the positions to which they might be promoted. For instance, Petitioner Howard was allegedly too deaf to do so, as well as having a spinal defect; Petitioner Jorden had previously sued FEC for on-the-job injuries and testimony had been presented on his behalf that he was permanently disabled; Petitioner Davis suffered from a heart murmur and high blood pressure; and Petitioner Meeks had diabetes and osteoarthritis of both knees.

[17]The use of neutral doctors to resolve such disputes has been specifically approved by this Court in another context. *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257 (1965).

Judge Scott was in a uniquely qualified position to exercise a fully informed discretion on the appropriateness of this settlement. It is his discretion, his decisions, his judgments, and his opinions that are under attack here, yet he had a range of knowledge and information shaping that discretion which perhaps exceeded that of the litigants themselves. The petitioner's attorneys admitted below that he had made a correct decision on the record before him, see R. 218. The petitioners attempt to divert the attention of this Court away from its proper focus upon the actions of the District Judge and focus it instead on alleged acts of misconduct on the part of the attorneys for the firemen. Indeed it is somewhat amazing that these counsel, who have so vigorously pursued and are pursuing the interests of not only the firemen, but members of many other operating and non-operating crafts employed by FEC should be so grossly attacked.[18] Yet Petitioners would have this Court believe that while counsel robbed the passengers, the District Judge "high-balled" the train beyond the reach of justice.

The acts of Judge and counsel in the proceedings below were entirely proper and in no way prejudicial to Petitioners or the class. The representation of IARE was in no way a conflict of interest, although Peti-

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[18]Mr. Milledge was of counsel in not only the present case but had also successfully attacked the physical disability settlement in the *Harrison* case. He further represented and still represents the non-operating crafts in the *U.S. v. F.E.C. Ry. Co.* case which has been to both this Court and the Court of Appeals. He represented the operating crafts in the District Court, the Court of Appeals and here in this Court in several cases.

tioners heatedly assert it was and rely heavily upon these assertions. At no time did IARE take any position that in any way conflicted with the apparent desires of the overwhelming majority of its members. Although it may not have pleased them all, it is scarcely likely that it could do so in a situation such as here involved. IARE had never breached its duty of fair representation, although once it had exceeded its authority, but only in a good-faith attempt to resolve a number of festering disputes. At no time did IARE assert any claims on behalf of itself or seek a share of the settlement for itself. Indeed, it bargained itself out of a job for the benefit of its members. It is therefore scarcely surprising that the District Judge found that assertions regarding the role of IARE or its representation by Milledge & Horn to be groundless and of no legal consequence (Pet. App. A17-A19, para. 4). This Court likewise should not be distracted by this smoke-screen.

The propriety of the class action motions and determination, plus the reasons therefor, have also been extensively discussed by the District Court and need not be repeated here (see Pet. App. A15-A17, para. 3). It is clearly correct and furnishes no reason for this Court to act. The filing by Milledge & Horn of amendments to state a class action and of a motion to maintain the suit as a class action were procedural steps taken by them to enforce their clients' rights and based on their professional judgment that such steps were necessary and proper in furtherance of the interests of their clients. Again these acts were clearly within their authority as counsel of record and fur-

nish no reason for the supervisory powers of this Court to be exercised.

The exclusively preliminary nature of the order of December 30, 1969, has already been extensively discussed. With the Court and parties so painfully aware of its indispositive nature, and so careful to frame the documents against finality, it is difficult to take seriously the assertions of Petitioners that their rights to protest and oppose the settlement were somehow so effectively vitiated that this Court must step in where other courts below have seen no need to tread.

Rather the proceedings below fully comport with the requirements and intent of Rule 23. On full and adequate notice a hearing was held where all class members could express their views. That some remained silent for unexplained reasons, even though allegedly they opposed the settlement, is not a reason for granting certiorari but rather an estoppel which may even be viewed as destroying any right to appeal or seek certiorari, especially when coupled with the receipt and retention of the benefits of the settlement. Even those who protested sought only a greater individual share and each, after careful explanation by the District Judge, stated that he did not wish to be understood as opposing the settlement as a whole. See R103, 104 re Crump, R114-115 re Howard, R124, 128 re Jorden. Crump and Howard repeated their positions through counsel after conferring with counsel during a recess. R120-121. Thus any assertions now made by Petitioners that all of any of them really opposed the settlement is clearly wrong.

Regardless of the extended protects now made by Petitioners, these protests all come far too late. They are the after-thoughts of dissatisfied men who failed to take any action on their own behalf when they had the opportunity to do so. Before final approval, Petitioners heard, saw, and spoke no evil, although they now claim they were fully aware of it. They cannot now escape the consequences of their own deliberate failure to act. They cannot now bootstrap themselves into a successful attack on the judgments below on the grounds of prejudice caused by themselves. This Court clearly must deny their petition.

One final, important consideration must be advanced. As found by the Court below, and unchallenged here, almost the entire class has accepted and retained the benefits of the settlement. Even the two who did not do so are still holding their checks. No one has offered to restore the $300,000 paid out. This fact, combined with the actual and constructive knowledge of the settlement terms, the complete failure of almost all class members to oppose the settlement, and the very limited and indirect opposition of three firemen brings this case within the unanimously expressed rules of ratification and estoppel. To the long list of authorities cited by the District Court, see Pet. App. A28, A29, A30, A32 should be added also the following: *Cox v. Esso Shipping Co.*, 247 F.2d 629, at 637-638 (5 Cir. 1957); *Kaiser v. Standard Oil Co. of New Jersey*, 89 F.2d 58 (5 Cir. 1937); *Livesay Industries, Inc. v. Livesay Window Co.*, 202 F.2d 378, at 382 (5 Cir. 1953), cert. denied 346 U.S. 855 (1953); *Colquette v. Crosett Lumber Co.*, 149 F.2d 116 (8 Cir. 1945); *American Na-*

tional Bank & Trust Co. of Chicago v. Taussig, 255 F.2d 765, at 769 (7 Cir. 1958); *Burgess v. Nail*, 103 F.2d 37 (10 Cir. 1939); *In re Denny*, 135 F.2d 184 (7 Cir. 1943), cert. den. 320 U.S. 747 (1943), reh. den. 320 U.S. 812 (1943); *Spanel v. Berkman*, 171 F.2d 513, at 515, 517, (7 Cir. 1949), cert. den. 336 U.S. 968 (1949); *Wilson v. Pantasote Co.*, 254 F.2d 700 (7 Cir. 1958); *Wilson v. Union Electric Light & Power Co.*, 59 F.2d 580 (8 Cir. 1932); *In re Greypoint Metallic Bed. Co.*, 113 F.2d 881 (2 Cir. 1940). These unanimous authorities are clearly applicable here. Petitioners have advanced no substantial reason why they should be exempt from the operation of these well established principles. These circumstances render this case clearly an inappropriate one for the exercise of discretionary supervision by this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition shall be denied.

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CERTIFICATE

I, Erle Phillips, Attorney for Respondent, Florida East Coast Railway Company, and a member of the bar of the United States Supreme Court, do hereby certify that three copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon opposing counsel by placing same in the United States mail, addressed to them at their offices with sufficient postage thereon annexed:

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